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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

H. J. JUSTIN AND SONS, INC. D/B/A
JUSTIN BOOT COMPANY, *Petitioner*

vs.

GEORGE DEUKMEJIAN, GOVERNOR, STATE OF
CALIFORNIA, ET AL., *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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ISSUES PRESENTED

1. Whether the Convention on International Trade in Endangered Species of Wild Fauna and Flora, as implemented by the Endangered Species Act of 1973, 16 U.S.C. §1531-1543, permits the imposition of a state embargo on foreign trade in wildlife species not indigenous to the United States.

2. Whether the General Agreement on Trade and Tariffs and the Trade Agreements Act of 1979 permit the imposition of a state embargo on foreign trade in the hides of animal and reptile species not listed as endangered or threatened under the Convention on International Trade in Endangered Species of Wild Fauna and Flora or the Endangered Species Act of 1973.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

H. J. Justin and Sons, Inc. D/B/A
Justin Boot Company, *Petitioner*

vs.

George Deukmejian, Governor, State of
California, et al., *Respondents*

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit in the case of *H. J. Justin & Sons, Inc., d/b/a Justin Boot Company v. Edmund G. Brown, Jr., Governor, State of California, et al.**, No. 81-4492, reported at __ F.2d __, which reversed in part and affirmed in part the opinion and judgment of the United States District Court for the Eastern District of California, No. CIV. S-80-941 RAR, reported at 519 F. Supp. 1383 (E.D. Cal. 1981). All relevant opinions are reproduced in the appendix.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1) to review the judgment of the United States Court of

*George Deukmejian was substituted as a party under Rule 43(c).

Appeals for the Ninth Circuit, filed and entered March 11, 1983.

APPLICABLE TREATIES, STATUTES, AND REGULATIONS

The treaties involved in this action are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249 (effective July 1, 1975) and the General Agreement on Tariffs and Trade, 61 Stats. A 3 (1947). The Convention is set out in full in the appendix. Pertinent excerpts of the General Agreement on Tariffs and Trade are set out in the appendix.

The federal statutes and regulations involved in this action are the Endangered Species Act of 1973, 16 U.S.C. §1531-1543, and regulations promulgated thereunder, 50 C.F.R. Parts 17 and 23 (1981); the Tariff Act of 1930, as amended, 19 U.S.C. §1202, Part 5, and §1527; and §§401 and 403 of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2531 and 2533(a).

The particular provision of the Endangered Species Act of 1973 to be construed is Section 6, 16 U.S.C. §1535(f), which provides as follows:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to any exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any state law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any state law or regulation respecting the taking of an endangered species or threatened species may be more restrictive

> than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

The specific regulations that are pertinent to this action are found at 50 C.F.R. §17.40(e)(2), §23.12(a)(2), and §23.15(a) (1981), all of which are set out in the appendix.

Section 497 of the Tariff Act of 1930, 19 U.S.C. §1527, and relevant portions of the tariff schedules are set out in the appendix. Sections 401 and 403(a) of the Trade Agreements Act of 1979, 19 U.S.C. §2531 and §2533(a) provide as follows:

> §2531. Certain standards-related activities.
>
> Nothing in this subchapter may be construed as prohibiting any private person, Federal agency, or State agency from engaging in standards-related activities that do not create unnecessary obstacles to the foreign commerce of the United States. No standards-related activity of any private person, Federal agency, or State agency shall be deemed to constitute an unnecessary obstacle to the foreign commerce of the United States if the demonstrable purpose of the standards-related activity is to achieve a legitimate domestic objective including, but not limited to, the protection of legitimate health or safety, essential security, environmental, or consumer interests and if such activity does not operate to exclude imported products which fully meet the objectives of such activity.
>
> §2533. State and private standards-related activities.
>
> (a) In general. — It is the sense of the Congress that no State agency and no private person should engage in any standards-related activity that creates unnecessary obstacles to the foreign commerce of the United States.

The state statute challenged by petitioner is California Penal Code §653o, which provides as follows:

> It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or part or product thereof of any . . . python . . . kangaroo . . . or elephant.
>
> Any person who violates any provision of this section is guilty of a misdemeanor and shall be subject to a fine of not less than one thousand dollars ($1,000.00) and not to exceed five thousand dollars ($5,000.00) or imprisonment in the county jail not to exceed six months, or both such fine and imprisonment, for each violation.

Section 653r of the California Penal Code further provides in pertinent part as follows:

> . . . it shall be unlawful to possess with intent to sell, or to sell, within this state, after June 1, 1972, the dead body, or any part or product thereof, of any fish, bird, amphibian, reptile, or mammal specified in Section 653o or 653p.
>
> Violation of this section constitutes a misdemeanor.

STATEMENT OF THE CASE

Petitioner H. J. Justin and Sons, Inc. ("Justin") fabricates boots from the hides of animals, including the hides of the African elephant, the Indonesian python, and the Australian kangaroo. Plaintiff would market these boots in California but for California Penal Code §§653o and 653r, which *inter alia* forbid the sale within California of products made from elephant, python, or kangaroo skins. It is undisputed that such products were taken, processed, imported and fabricated in compliance with the laws of the country of export, the Convention, and the Endangered Species Act.

The African elephant is listed as a threatened species in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249 (the "Convention") and under §4 of the Endangered Species Act of 1973, as amended, 16 U.S.C. §1533. Justin holds a renewable permit under 50 C.F.R. 17.40(e), promulgated under 16 U.S.C. 1533(n), authorizing it to sell products manufactured from African elephant skin. The Indonesian python is also listed as a threatened species under Appendix II of the Convention but is not enumerated as an endangered or threatened species under §1533 of the Act. Justin lawfully imports Indonesian python skin pursuant to a permit issued by the country of origin in compliance with 50 C.F.R. §23.12(a) and §23.15(a), promulgated under 16 U.S.C §§1537(e) and 1537a. The Australian kangaroo (Macropus robustus) is not enumerated in any appendix to the Convention and is not listed as either endangered or threatened under the Act. Therefore, no permit is required in order to import the skins of the Australian kangaroo lawfully into the United States. Leather is enumerated as an article of foreign commerce subject to the free trade requirements of the General Agreement on Tariff and Trade ("GATT"), the United States tariff schedules promulgated under the Tariff Act of 1930, as amended, 19 U.S.C. §1202, Part 5, and the Trade Agreements Act of 1979.

The case was presented for decision on cross-motions for summary judgment, no material facts being in dispute. The United States District Court for the Eastern District of California entered its opinion and judgment on August 21, 1981, holding in part that §6 of the Endangered Species Act, 19 U.S.C. §1535(f), does not preempt state laws prohibiting foreign commerce in non-indigenous wildlife species unless such trade is authorized by a permit from the Secretary of the Interior. The district court did not address the significance of statutes and treaties governing foreign commerce.

Justin, as appellant, filed a timely notice of appeal on September 22, 1981. On March 11, 1983, the United States Court

of Appeals for the Ninth Circuit reversed in part and affirmed in part the district court's ruling based upon *Man Hing Ivory & Imports, Inc. v. Deukmejian*, No. 82-4303, (9th Circuit, decided March 11, 1983). [See Appendix A-20] The Court of Appeals sustained the district court's holding that a state could not prohibit trade authorized by a permit from the Secretary but could prohibit trade in non-indigenous wildlife species, such as the Indonesian python and the Australian kangaroo that have not been listed by the Secretary as endangered or threatened. The Court of Appeals did not discuss the effect of the General Agreement on Tariffs and Trade and other federal trade statutes governing foreign commerce.

REASONS FOR GRANTING THE WRIT

SYNOPSIS

The decision of the Court of Appeals for the Ninth Circuit in this action is the first circuit court opinion construing the express preemption language of the Endangered Species Act. This action presents a pure question of law that will effectively determine the validity of laws in 35 states other than California that prohibit foreign commerce in wildlife species not indigenous to the United States where such trade is otherwise in compliance with federal law and the laws of the country of export. The construction adopted by the Court of Appeals unnecessarily puts the United States at odds with its trade partners under the Convention and the GATT by allowing states to embargo trade in those countries' wildlilfe products in the absence of a demonstrable domestic interest in protecting that state's environment. This construction is not supported by the language of the Act or its legislative history and creates anomalous results in application. Petitioner contends, therefore, that any doubts as to the extent of preemption should be resolved by this Court.

I.

THE ISSUES PRESENTED INVOLVE A SIGNIFICANT QUESTION THAT HAS NOT YET BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT BECAUSE IT DETERMINES THE VALIDITY OF LAWS IN SEVERAL STATES THAT NOW PROHIBIT OR CONTEMPLATE PROHIBITION OF TRADE IN ARTICLES OF FOREIGN COMMERCE.

A. The Endangered Species Act of 1973 expressly preempts state laws burdening foreign and interstate commerce in wildlife species where such trade is authorized by permits under the Convention.

1. Summary of the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (the "Convention"), which was ratified by the Senate on August 3, 1973, and went into effect according to its terms on July 1, 1975, begins with the premise that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come." The mechanism devised for serving this goal consisted of scientific identification of species in need of protection and restricted trade in those species under a system of permits to be administered at the national level by scientific and management authorities created and maintained by each signatory country.

Recognizing that "peoples and states are and should be the best protectors of their own wild fauna and flora" but that international cooperation is essential to prevent overexploitation through the demands of international trade, each signatory nation binds herself to create the necessary scientific and management authorities and to prohibit all trade in violation of the Convention through appropriate civil and criminal penalties and forfeiture proceedings. The Convention

categorizes species in need of its protection according to the degree to which they are threatened with extinction and restricts trade commensurately. Appendix I to the Convention includes all species under a present threat of extinction and for which trade can be authorized only by permits from the country of export *and* the country of import documenting that the scientific authorities of both countries have determined that such trade will not be detrimental to the survival of the species involved. Appendix II lists species not presently threatened with extinction but for which unrestricted trade may be a serious risk and must be closely monitored by the country of origin. Trade in species listed in Appendix II, such as the African elephant and the Indonesian python, is prohibited unless authorized by a permit from the country of export documenting that its scientific authority has determined that such trade will not be detrimental to survival of the species. Appendix III includes all species that any signatory nation identifies as regulated within its jurisdiction and needing the cooperation of the other parties in the control of trade in order to prevent or restrict exploitation. Trade in an Appendix III species requires only a permit from the country of export stating that the specimen was not obtained in contravention of the laws of that country. Although certain species of kangaroo have been listed in Appendix II, Australia has not elected to place the Australian kangaroo in Appendix III.

2. Summary of the Endangered Species Act of 1973.

Contemporaneous with the negotiation and ratification of the Convention, the Congress of the United States enacted the Endangered Species Act of 1973 (effective December 28, 1973). The Endangered Species Act was intended to establish a comprehensive program to safeguard the Nation's heritage in indigenous fish, wildlife, and plants and also to provide the mechanism required to honor related international commitments, such as the Convention. 16 U.S.C. §1531. Thus, the Act not only designates the Secretary of the Interior, acting

through the United States Fish and Wildlife Service, to promulgate regulations implementing the Convention and to act as the management and scientific authorities for the United States, 16 U.S.C. §§1537(e) and 1537a, but also sets up a national conservation program with an independent mandate to identify species as endangered or threatened and to provide for their protection through other international agreements, financial assistance to the states and foreign countries, scientific research, and acquisition of critical habitats. Regulations promulgated under the Act provide for permits, exceptions, and exemptions incident to the Convention and to the national conservation program. 50 C.F.R. Parts 17 and 23 (1981).

Under his national conservation authority, the Secretary* is entitled to designate species needing protection as "endangered" or "threatened." 16 U.S.C §1533. The definition of an endangered species is substantially the same as the criteria for inclusion under Appendix I of the Convention. 16 U.S.C. §1532(4). The definition of a threatened species corresponds in substance to Appendix II of the Convention. 16 U.S.C. §1532(15). A species not indigenous to the United States may be listed by the Secretary even though included under an Appendix of the Convention because the Secretary determines that additional protection is required. 16 U.S.C. §§1533(a)(4) and 1533(b)(2) and (3). In that instance, trade in the listed species is subject both to the regulations implementing the Convention, 50 C.F.R. Part 23, and to the regulations implementing the national conservation program, 50 C.F.R. Part 17. For example, the African elephant is listed under Appendix II to the Convention and consequently can only be imported into the United States under a permit from the country of export stating that such trade will not be detrimental to survival of the species. 16 U.S.C. §1538(c); 50 C.F.R. 23.12(2). Because African elephant is also listed by the

*Both the Secretary of the Interior and the Secretary of Commerce have authority to designate species as threatened or endangered within their respective areas of responsibility. 16 U.S.C. §1533(2). For convenience, no distinction is made between secretaries in this petition.

Secretary as threatened, 50 C.F.R. 17.11 (1981), importation even with a permit from the country of export is prohibited except under a federal permit for scientific purposes, economic hardship, or other special purpose, 16 U.S.C. §1538(a); 50 C.F.R. §17.40(e) (1981). The Secretary has not deemed it necessary to provide more protection for Indonesian python than that provided by its inclusion in Appendix II of the Convention. Therefore, Indonesian python can be imported into the United States on the strength of a permit from the country of export approved by that country's scientific authority. 50 C.F.R. 23.12(2).

3. The Endangered Species Act expressly preempts state law more restrictive than permits issued under regulations implementing the Convention.

The single issue in this action is construction of the express preemption language of Section 6 of the Endangered Species Act, 16 U.S.C. §1535(f), as applied to state embargos against foreign and interstate commerce in wildlife species not indigenous to the United States. Section 6 of the Act, 16 U.S.C, §1535(f), provides as follows:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, *endangered species or threatened species* is void to the extent that it may effectively (1) permit which is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to *conserve* migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the *taking* of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter

> or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined. [emphasis added]

Both courts below construed reference to "endangered species and threatened species" to mean only those species listed by the Secretary under §1533 of the Act. Consequently, the "permits provided for in this chapter or in any regulation which implements this chapter" meant only those permits issued by the Secretary with respect to species listed under §1533 and not the permits issued by a country of export under 50 C.F.R. §23.12 or by the Secretary acting as the scientific or managing authority for the United States under 50 C.F.R. §23.13 and 23.15. This construction ignores the definitions provided by the Act and leaves to implication any preemption of state laws that are in conflict with the Convention.

Section 8 of the Act, 16 U.S.C. §1538, prohibits trade in violation of the Convention and the regulations implementing it as well as the regulations protecting species listed by the Secretary. Thus, preemption of state laws in conflict with the Convention should be co-extensive with preemption of state laws in conflict with regulations protecting species listed by the Secretary. However, if the reference to endangered and threatened species applies only to species separately listed by the Secretary, then §1535(f) does not expressly preempt state laws that conflict with the Convention, whether such laws are more or less restrictive than the Convention.

The terms "endangered species" and "threatened species" are not defined or consistently used in the Act to mean only those species listed by the Secretary under §1533. An "endangered species" is a species in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. §1532(4). A "threatened species" is one which is likely to become an endangered species within the foreseeable future. 16 U.S.C. §1532(15). These definitions, unless clearly limited by the context or restrictive language, include species that are treated as endangered or threatened under federal, state, or interna-

tional law as well as species that may be endangered or threatened although not recognized as such by any government. The courts below failed to note that various other sections of the Act specifically confine the term "endangered or threatened species" to those listed by the Secretary; whereas, §1535(f) does not. *See, e.g.*, 16 U.S.C. §1534, 1536(a)(1), 1537(a) and (b), and 1538(a); *cf.*, 16 U.S.C. §1535(c)(1).

The scope of express preemption provided by §1535(f) should not be limited only to state laws affecting species listed by the Secretary but should be construed to deal comprehensively with the preemption of any state law that has as its object the preservation of wildlife, both because of the language of the provision and because of the consequences for foreign commerce discussed in the following section of this petition. Petitioner contends that "endangered or threatened species" should include species listed under the Convention as well as by the Secretary and, therefore, that states cannot prohibit foreign or interstate commerce in non-resident wildlife species covered by a permit issued by the Secretary under Part 17 of the regulations or by permits issued pursuant to the Convention under Part 23 of the regulations. States would be free in any event to enact "conservation" measures, defined in §1532(2), or "taking" measures, defined in §1532(14), that govern resident species, even to the extent of prohibiting their sale. This construction gives effect to all parts of §1535(f), provides for express preemption of state laws in conflict with the Convention, and eliminates the anomaly of trade in python and kangaroo being more restricted than African elephant.

4. The official legislative history of the Endangered Species Act does not support the Court of Appeals' construction.

Because the language of §1535(f) is not ambiguous when taken in conjunction with the purposes set out in §1531 and the definitions contained in §1532 of the Act, resort to legislative history is neither necessary nor appropriate. However, the official legislative history of the Act, 1973 U.S. Code Cong. &

Adm. News, p. 2989, supports the petitioner's construction to the limited extent preemption is addressed.

Senate Report No. 93-307, 93d Congress, 1st Session (July 1, 1973) contains the following explanation of S. 1983, which was the version of the bill ultimately enacted:

> * * * The Committee decided that the most effective way to fulfill the provisions of the Act was through delegation of authority to approved State agencies. * * * *The Federal government shall retain its authority to regulate the interstate and foreign commerce of endangered species*, whether or not it has established such agreements with the States.
>
> * * *
>
> (6) Section 6 (Cooperation with the States)
>
> Subsection (f) (State Action Permitted) makes it clear that this Act shall in no way be construed to hold any State to a Federal standard which is lower or less protective of any endangered or threatened species, *except for foreign commerce matters.* [emphasis added]

Likewise, the Conference Report No. 93-740 discussed the extent of preemption in the following language.

> Section 6. Cooperation with the States
>
> * * *
>
> As finally approved, the Act will have the effect of giving the states fundamental roles with regard to resident species for a given period of time (15 months, or 120 days after adjournment of the first legislative session of any state which commences after passage of the Act). The conferees hope that this device will impel the states to develop strong programs to avoid the alternative of federal preemption.
>
> * * *
>
> During the establishment period, the states retain authority to regulate the taking of resident

> endangered and threatened species of fish and wildlife *(which are not otherwise covered by treaty or federal law)*.

In contrast, House Report No. 93-412, 93d Congress, 1st Session (July 27, 1973), which is not part of the official legislative history, contains the following statement regarding preemption:

> (f) This paragraph indicates that the states are to be free to develop regulatory mechanisms which are more stringent or more restrictive than those of the Federal government. Existing state endangered species programs would, for example, be in a position to include species which were not on the Federal list. *The only exception to this is contained in the language which expressly prohibits the state from permitting specific actions forbidden by Federal agencies.* In all other regards, the state law is not pre-empted, but is merely subject to the Federal "floor" of regulations under the Act. Thus, laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdictions would remain unaffected. [emphasis added]

Clearly, the construction adopted by the Court of Appeals makes no distinction based upon the status of goods as foreign commerce, as contemplated by the Senate Report, and provides no preemption of state laws affecting species covered by treaty, as contemplated by the Conference Report. Thus, the opinion sought to be reviewed draws only upon unofficial portions of a conflicting legislative history as the source of its interpretation of §1535(f).

B. Laws now in force in 35 states other than California either prohibit trade in wildlife species not indigenous to the United States or can be construed to allow prohibition of such trade.

The validity, in whole or in part, of laws now in force in 35 states other than California will be determined by the construction placed upon §1535(f) in this action. All 50 states and the District of Columbia now have statutes directed to the preservation of wildlife species. [See Appendix for summary.] Fifteen of these presently confine their application to species indigenous to that state or provide a general exception for species lawfully imported into the United States. These laws will not be affected by the outcome of this case. In 4 states, however, non-indigenous species are or can be protected and exception is made only for species covered by a federal permit. At least 26 more states have laws similar to California in that species not indigenous to that state or to the United States are or may be designated as endangered or threatened, trade in them is prohibited, and no exception is stated for species covered by a federal permit or otherwise lawfully imported into the United States.

For these reasons, any doubts as to the construction of Section 6 of the Endangered Species Act of 1973, 16 U.S.C. §1535(f), should be settled by this Court.

II.

THE ISSUES PRESENTED INVOLVE SIGNIFICANT AND UNRESOLVED QUESTIONS REGARDING THE HARMONIZATION OF THE CONVENTION, AS IMPLEMENTED BY THE ENDANGERED SPECIES ACT OF 1973, WITH THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND THE TRADE AGREEMENTS ACT OF 1979 THAT SHOULD BE RESOLVED BY THIS COURT.

The General Agreement on Tariffs and Trade ("GATT") accords most favored nation status to such countries as Australia, New Zealand, Burma and Ceylon. As amended, it rep-

resents an international policy of non-discriminatory trade among the highly developed signatory nations (Parts I-III) as well as a policy of free trade on a basis favorable to the less developed nations (Part IV). The GATT expressly recognizes the right of a signatory nation to prohibit trade in a particular article of commerce "to protect human, animal, or plant life or health," Article XX, GATT, Part II, but requires the contracting parties to assure compliance by their political subdivisions at the local level. Article XXIV (12), GATT, Part III. Leather is a category of like articles of commerce for purposes of the GATT and the Tariff Act of 1930, 19 U.S.C. §1202, Part 5.

The Convention and the Endangered Species Act are clearly examples of measures adopted by a contracting nation under the GATT to protect health and welfare. Likewise, Article XIV(2) of the Convention provides that it was not intended to affect the obligations of any party under other treaties or trade agreements. See also §1540(h). Thus, it is apparent that neither the Convention nor the Endangered Species Act were intended to repeal or supersede the GATT and its implementing legislation but that they should be harmonized consistent with their purposes. The subsequently enacted Trade Agreements Act of 1979, 19 U.S.C. §§2501-2582 is the key to such harmonization.

The construction of §1535(f) adopted by the Court of Appeals unnecessarily creates friction between the requirements of free trade and environmental protection. Part IV of the GATT, added in 1969, contemplates the grant of special concessions to encourage development of international trade originating from less developed nations, with or without reciprocity on the part of the less developed country. Reduction of tariffs, non-tariff import barriers and other disguised restrictions on international trade are an affirmative obligation on the part of the developed nations. The GATT, therefore, requires the United States to preempt state laws that impose undue or discriminatory restrictions upon foreign commerce. Consistent with this concession, §401 of the Trade Agreements Act of 1979, 19 U.S.C. § 2531, expressly preempts state

laws that constitute unnecessary obstacles to the foreign commerce of the United States unless the demonstrable purpose of the state statute is "to achieve a legitimate domestic objective including, but not limited to . . . environmental . . . interests."

It is not seriously contended that African elephant, Indonesian python, or Australian kangaroo are species that have ever existed in the wild anywhere within the territorial limits of the United States. Nor have the provisions of the California Penal Code at issue in this case been defended as necessary to public health, safety, or morals as those terms are ordinarily understood. Therefore, not only is any product fabricated from such skins necessarily an article of foreign commerce but, more importantly, California's interest in protecting such species cannot be classed as a demonstrable domestic interest under §401 of the Trade Agreements Act. No state has an individual, localized interest in preservation of wildlife species native to foreign countries separate from the interest of all people subject to the jurisdiction of the United States. Therefore, states cannot independently prohibit foreign commerce in non-resident species such as the Australian kangaroo that have not been identified as endangered or threatened by federal law or treaty. Preemption of state laws in this category will not eliminate efforts to protect and preserve the wildlife of the world for all humanity but will only mean that the scientific and economic decisions as to when and how to institute measures protecting distant species at the expense of closing the markets of the United States to articles of foreign commerce will be made at the national rather than at the state level.

Therefore, skins of the Indonesian python lawfully imported into the United States under a permit issued by the country of export and skins of the Australian kangaroo are to be freely traded throughout the United States pursuant to the GATT, the Convention, and their implementing legislation. State laws imposing an embargo on such trade are void under the supremacy clause of the United States Constitution.

III.

THE CONSTRUCTION ADOPTED BY THE COURT OF APPEALS CREATES ANOMALOUS RESULTS INCONSISTENT WITH THE PURPOSES OF THE CONVENTION AND THE ENDANGERED SPECIES ACT.

Of the three species at issue in this action, African elephant is undoubtedly the species most at risk. It is listed in Appendix II of the Convention and by the Secretary under §1533. Logically, trade in African elephant products should be the most restricted. Trade in the Indonesian python and Australian kangaroo should be restricted to the degree deemed appropriate by the country of their origin. Under the construction adopted by the Court of Appeals, however, trade in the African elephant cannot be prohibited by a state in the face of a federal permit; whereas, trade in the Indonesian python and the Australian kangaroo can be prohibited. This construction distorts the tiers of increased protection that would be afforded to these species and others in their categories by proper interaction among the GATT, the Trade Agreements Act, the Convention, and the Endangered Species Act.

Although a court cannot rewrite a statute to avoid anomalous or unjust results where the statute is clear and unambiguous, the existence of anomalies in application is a criteria for choosing between alternative constructions. If §1535(f) is construed to preempt state statutes that prohibit what has been authorized by an exemption or a permit from the country of export under 50 C.F.R. Part 23, trade in species that are listed by the Secretary and under the Convention would always be at least as restricted as trade in species that are listed only by the Convention. Trade in the skins of non-indigenous species that are not listed by either would be no more restricted than trade in ordinary leather, consistent with the GATT and other international trade agreements.

CONCLUSION

In order to properly harmonize the Convention and its implementing legislation with the free trade policy adopted by the United States in the area of foreign relations, §1535(f) should be construed to preempt all state laws directed to the preservation of non-indigenous wildlife species to the extent such laws (1) permit what is prohibited by the Act, including violations of the Conventions, or (2) prohibit trade that is authorized under a permit provided for in the regulations implementing the Act, including the regulations contained in 50 C.F.R. Part 23. State laws placing an embargo on foreign commerce in the skins of species not indigenous to that state should be preempted under 19 U.S.C. §2531, as an unnecessary obstacle to foreign commerce. This construction gives effect to all parts of the provision and remove any anomalies in the treatment of non-indigenous species under the Act and the Convention.

For all of the foregoing reasons, petitioner asks that a writ of certiorari issue to review the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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By _____
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By _____
Janice A. Schattman
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing was forwarded by certified mail, return receipt requested, to all counsel of record.

SIGNED this ____ day of _____, 1983.

_____

John B. McAdams

APPENDIX

Opinions Below

Opinion of the U.S. District Court for the Eastern District of California A-1

Opinion of the Court of Appeals for the Ninth Circuit in *Justin v. Deukmejian* A-17

Opinion of the Court of Appeals for the Ninth Circuit in *Man Hing Ivory & Imports, Inc. v. Deukmejian* A-20

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Summary of State Conservation Laws A-78

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

No. CIV.S-80-941 RAR

H. J. JUSTIN & SONS, INC.,
dba JUSTIN BOOT COMPANY, a Texas corporation,
Plaintiff

vs.

EDMUND G. BROWN, JR.,
Governor of the State of California, and
GEORGE DEUKMEJIAN, Attorney General of the
State of California, Defendants.

MEMORANDUM AND ORDER

The above-entitled matter came on regularly for hearing by way of cross-motions for summary judgment before the Honorable Raul A. Ramirez on June 8, 1981. Donald M. Pach, Esq. appeared as counsel for plaintiff and Joel Moskowitz, Deputy Attorney General, appeared as counsel for the defendants. Having duly examined the memoranda of points and authorities submitted in support of and in opposition to the respective motions, the exhibits attached thereto, and the respective arguments of counsel, the Court now renders the following memorandum decision:

There are no material issues of fact in dispute. The plaintiff, H. J. JUSTIN & SONS, INC. (hereinafter Justin Boot), fabricates boots from the hides of animals, including the hides of the African elephant, the Indonesian python, and the Wallaby kangaroo. Plaintiff is desirous of selling these boots in California but is deterred from said action by California Penal Code §§653o and 653r, which, inter alia, forbid the sale within Cali-

fornia of products made from the dead bodies, or any part thereof, of the elephant, python, or kangaroo.[1]

Plaintiff initially commenced the present action for declaratory and injunctive relief, and now moves for summary judgment, on the grounds that the challenged provisions of the California Penal Code are unconstitutional. In essence, plaintiff contends that §§653o and 653r of the California Penal Code have been preempted by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249, and by the Endangered Species Act of 1973, 16 U.S.C. §§1531-1543. Plaintiff also contends that these provisions of the California Penal Code impermissibly burden interstate commerce in violation of the Commerce Clause, U.S. Const., Art. I, §8.

The Court has jurisdiction over the instant action by virtue of 28 U.S.C. §1331 and 16 U.S.C §1540(c). In addition thereto, venue is proper inasmuch as Sacramento is the seat of government for the State of California, Cal. Gov't Code §450 and because the named defendants are being sued in their official capacities as constitutional officers of the State of California, Cal. Gov't Code §1060.

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[1]California Penal Code §§653o and 653r provide as follows:

§653o:

(a) It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any alligator, crocodile, polar bear, leopard, ocelot, tiger, cheetah, jaguar, sable antelope, wolf (Canus lupus), zebra, whale, cobra, python, sea turtle, colobus monkey, kangaroo, vicuna, sea otter, free-roaming feral horse, dolphin, or porpoise (Delphinidae), Spanish lynx, or elephant. (Emphasis added)

§653r:

Notwithstanding the provisions of Section 3 of Chapter 1557 of the Statutes of 1970, it shall be unlawful to possess with intent to sell, or to sell, within the state, after June 1, 1972, the dead body, or any part or product thereof, of any fish, bird, amphibian, reptile, or mammal specified in Section 653o or 653p.

The basic principles of the preemption doctrine are too well-settled to require citation: while the states are not prohibited from legislating and regulating in those areas where the states and Congress have concurrent jurisdiction, by virtue of the Supremacy Clause of the United States Constitution, Article VI, Clause 2, the authority of the states to legislate in an area of concurrent jurisdiction is always at the sufferance of Congress. In those areas where Congress has indeed exercised its jurisdiction, it may allow for the continued operation of state legislation and regulation, or it may abrogate state law entirely. Therefore, whether a particular federal enactment preempts state law is always purely a question of Congressional intent.

Occasionally Congress directly addresses the issue of preemption, expressly providing in the text of the legislation for either the abrogation or the continued operation of state law. Frequently, however, Congress remains silent on the issue and it is in those specific instances where it becomes the responsibility of the courts to discover true Congressional intent. In this regard, the courts have recognized the value of certain indicia of Congressional intent:

— are the requirements of the federal law and the state law inevitably conflicting, so that a law-abiding individual cannot comply with both simultaneously?
— what does the legislative history indicate?
— is the federal legislation so complete a regulatory scheme that a Congressional intent to "occupy the field" may be inferred?
— is the subject matter of the legislation one traditionally committed to state or federal concern?

I

THE ENDANGERED SPECIES ACT OF 1973 EXPRESS PREEMPTION

Both the plaintiff and the defendants agree that in passing the Endangered Species Act of 1973, 16 U.S.C. §§1531-1543,

Congress expressly addressed the issue of preemption. They disagree, however, on the meaning of what Congress actually said. The relevant portions of the Act, 16 U.S.C. §1535(f), reads as follows:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

The plaintiff argues that the residuum of legislative power left to the states in §1535(f) is limited to the regulation of indigenous species. In support of this argument, plaintiff focuses on the reference to "migratory, resident, or introduced fish or wildlife" in the penultimate sentence and the reference to taking[2] in the last sentence. Additionally, plaintiff argues that subsection (f) should be construed in light of the other subsections of §1535, which unambiguously apply to indigenous species. In particular, the plaintiff points the Court's attention to subsection (c).

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[2]Section 1532(19) defines "taking" as the harassing, harming, pursuing, hunting, shooting, wounding, killing, trapping, capturing, collecting of any protected animal, or attempting to do any of those things. Such activities can logically only take place in the animal's habitat, and thus "taking" statutes only have meaning with respect to indigenous species.

Subsection (c) of §1535 is an elaborate and complex provision authorizing the Secretary of the Interior to enter into "cooperative agreements" with the sundry states. By entering into a cooperative agreement with a state, the Secretary delegates the responsibility with which he is otherwise charged to that particular state. Subsection (c) contemplates that the state will assume the responsibility for the conservation of indigenous species, once the Secretary is satisfied that the state is ready, willing, and able to do so.

Plaintiff contends that subsection (c) evinces a high degree of Congressional concern for responsible state action vis-a-vis indigenous species, and that subsection (f) must be read in terms of that high degree of Congressional concern. Thus plaintiff contends that subsection (f) must be read in the narrowest possible manner.

In opposition to the argument of plaintiff, defendants argue that the last two sentences of subsection (f) are irrelevant to the instant litigation. While admitting that the questioned sentences do in fact express Congressional intent on the subject of preemption of state law regulating indigenous species, defendants contend that the initial sentence of subsection (f) expresses Congressional intent on the subject of preemption of state law regulating other-than-indigenous species. Since the first sentence of subsection (f) refers specifically to state laws or regulations ". . . with respect to the importation . . . of . . . endangered species or threatened species . . . ," defendants persuasively argue that this language can hardly apply to indigenous animals. Thus the defendants would have the Court interpret subsection (f) as though it read as follows:

> (i) State law or regulations applying to non-indigenous species:
> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that [, and only to the extent that,] it may effectively (1) permit

what is prohibited . . . or (2) prohibit what is authorized by permit or exemption. . . .

(ii) State law or regulations applying to indigenous species:

This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits . . . but not less restrictive. . . .

While subsection (f) does not perhaps reach that level of clarity of which the English language is capable, the Court is of the opinion that the interpretation urged by the defendants is the more reasonable. The explicit reference in the first sentence to "importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species" can only be understood to refer to state laws relating to non-indigenous species. In short, the mere reference in the last two sentences to indigenous species does not support the inference that Congress was likewise referring to indigenous species in the first sentence. The interpretation urged by the defendants makes the entire section intelligible, and gives effect to all of the subsection.

As to plaintiff's contention that subsection (c) evinces a high degree of Congressional concern, or even distrust, of the states' willingness or ability to protect endangered or threatened species, the Court is of the opinion that any and all such concern has no bearing on the proper construction of subsection (f). The mere fact that Congress wanted to assure itself that its delegee, the Secretary of the Interior, would not redelegate conservation responsibility without sufficient assurance that the state would meet that responsibility is hardly demonstrative of Congressional unwillingness to permit the states to give more protection to non-indigenous species.

In conclusion, the Court finds that insofar as §1535(f) constitutes an express statement of Congressional intent on the issue of preemption, it expressly permits the states to continue to legislate and regulate with respect to the importation, exportation, interstate or foreign commerce in non-indigenous species, subject only to the limitation that the states cannot relax the requirements of federal law or contravene the terms of a federal permit or exemption.

IMPLIED PREEMPTION

As noted above, §1535(f) is not a pellucid expression of Congressional intent, and for this reason, this Court deems it wise to employ those tools for the determination of Congressional intent as previously discussed. *Cf. Church of Scientology v. U.S. Dept. of Justice*, 612 F.2d 417, 421 (9th Cir. 1979).

A

Inherent Conflict

An inherent conflict between federal statute and state statute such that ". . . compliance with both federal and state regulations is a physical impossibility for one engaged in interstate commerce," *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 1217 (1963), necessarily justifies the inference that Congress intended to preempt state law. The Supremacy Clause, Article VI, Clause 2, requires that in the case of an inherent conflict, federal law prevails.

Plaintiff herein does not argue that compliance with both state and federal law is impossible nor is the argument made that a "Catch-22" situation is created by the simultaneous operation of state and federal law. Since Congressional intent on the subject of preemption is not illuminated either way, the Court will move to the remaining issues in an attempt to resolve the question at hand.

B

Legislative History

The legislative history of §1535(f) is replete with references to the issue of preemption. During the initial hearings by the House on several of the proposed bills to enact the Endangered Species Act of 1973, an Assistant Attorney General of the State of New York opined that the language of certain of the proposed bills was ambiguous, and that the ambiguity might threaten the continued validity of a New York statute quite similar to the California statutes challenged in the instant lawsuit. (The Endangered Species Act of 1973: Hearings before the Subcommittee on Fisheries and Wildlife, Conservation and the Environment, of the Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess. held March 15, 26, and 27, 1973, pg. 351, et seq.) The subcommittee members agreed that the language of some of the proposed bills was ambiguous. Since the Administration had drafted at least one of the proposed bills, the chair of the subcommittee wrote to the Assistant Secretary of the Interior for Fish and Wildlife and Parks for clarification of the Administration's position on preemption.

Douglas P. Wheeler, Deputy Assistant Secretary, wrote in response, speaking for the Administration. Mr. Wheeler indicated that it was not the Administration's intent to preempt state laws like New York's (or, ipso facto, California's). Furthermore, the Administration was desirous of making a distinction between state "taking" laws and state laws regulating interstate commerce in endangered species. State "taking" laws could be more restrictive than federal law regardless of the terms of a federal permit or exemption, whereas state regulation of interstate commerce could be more restrictive only if there was no federal permit or exemption. (Letter of June 13, 1973, from Douglas P. Wheeler to the Honorable John D. Dingell, Chairman of the Subcommittee, included in the Hearings transcript at page 387).

Mr. Wheeler agreed with the witness from New York and the members of the subcommittee that the Administration had expressed its intentions ambiguously. Therefore, on behalf of the Administration, Mr. Wheeler offered amending language that would clarify the Administration's intent. This proffered language was adopted by Congress and became §1535(f).

Of greater persuasive value is the official House Report on the Endangered Species Act, H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973). In the official House Report, the reporting Committee noted that the purpose of the proposed legislation was to increase the protection given endangered species by then-existing law. The Committee noted that among the principal changes effected by the new law was the following:

> 7. It allows states to adopt more restrictive legislation than the Federal laws.

The Committee explicated that with the following discussion:

> The question of preemption of state laws was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation, or interstate commerce; in any such case the State could not override the Federal action. <u>In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired</u>. (Emphasis added)

(Report No. 412 at page 7.)

This point was reiterated in the discussion of subsection (f):

> This paragraph indicates that the states are to be free to develop regulatory mechanisms which are more stringent or more restrictive than those of the Federal government. Existing state endangered species programs would, for example, be in a position to include species which were not on the Federal list. The only exception to this is contained in the language which expressly prohibits the state from voiding actions specifically permitted by Federal agencies or from permitting specific actions forbidden by Federal agencies. In all other regards, the state law is not pre-empted, but is merely subject to the Federal "floor" of regulations under the Act. Thus laws already passed in States such as New York, California [Cal. Penal Code §§653o and 653r], and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction, would remain unaffected. (Emphasis added)

(Report No. 412 at page 14.)

The quoted portions of the legislative history are unequivocal and are not qualified by any other portion of the legislative history.[3] Having examined the legislative history the Court is persuaded that Congress did not intend to preempt California Penal Code §§653o and 653r by the enactment of the Endangered Species Act of 1973.

C

Comprehensive Federal Legislation

Congressional intent to preempt state law is often inferred from the fact that the Congressional legislation is so thorough and complete that Congress has occupied the field, and there is no additional room for state legislation, see *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 98 S.Ct. 988 (1978).

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[3]There are remarks by various congressmen reflecting on the advantages of preemption. These remarks, being merely the expression of the opinion of the individual speaker, do not constitute reliable indicia of Congressional intent.

The plaintiff herein argues that the Endangered Species Act of 1973 is precisely the sort of comprehensive legislation that warrants the inference of Congressional intent to preempt. Plaintiff points to the time and effort that went into drafting the legislation, the careful balance of competing interests struck by the legislation, and the detail embraced by the legislation itself. Additionally, plaintiff asserts that the Endangered Species Act of 1973 creates a comprehensive scheme for the regulation of interstate commerce in endangered and threatened species, thus preempting state law.

In light of the legislative history as discussed herein, supra, the argument of plaintiff cannot be accepted. Congressional intent to preempt is only inferred from the comprehension of the legislative scheme, and an inference cannot be accorded the same weight as the express declaration of intent contained in the legislative history.

D

Traditional Province

A final factor considered by the courts in determing Congressional intent to preempt state law is whether the subject matter of the legislation in question in one traditionally committed to states opposed to federal concern, *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399 (1941). The plaintiff argues that the regulation of importation and exportation of foreign goods is the traditional province of Congress, and thus a Congressional intent to preempt state law should be inferred from the exercise of Congressional authority embodied in the Endangered Species Act of 1973.

Once again, the legislative history as discussed herein precludes the drawing of the inference suggested by the plaintiff and, accordingly, this Court must find that Congress did not intend to preempt California Penal Code §§653o and 653r, except to the extent that those sections prohibit what is authorized by a permit or exemption issued pursuant to the Act or its regulations.

II

THE CONVENTION

The plaintiff contends that California Penal Code §§653o and 653r are preempted not only by the Endangered Species Act of 1973 but also by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249. The plaintiff quite properly notes that by virtue of the Supremacy Clause, a treaty, once ratified by the United States Senate, is an integral part of the supreme law of the land and prevails over state law. From this position, plaintiff goes on to explicate what it perceives as the conflict existing between the California statutes and the Convention.

The Court finds it unnecessary to address the points raised by the plaintiff. The Convention is not self-executing since implementing legislation must be enacted by Congress before the Convention has the force of law. Moreover, once enacted, it is the implementing legislation, and not the treaty itself, that is the law of the land, *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980):

> Moreover, "if a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land.'" [cite]

The implementing legislation of the Convention is the Endangered Species Act of 1973, see, e.g., 16 U.S.C. §§1531(4)(F), 1532(4), 1537a, and 1538(c). In light of the Court's conclusion that the Endangered Species Act of 1973 did not preempt California Penal Code §§653o and 653r, there is no need to discuss the terms of the Convention.

III

THE PERMIT

Plaintiff concedes that he has no permit or exemption from the Secretary of the Interior to import or sell in interstate commerce the Indonesian python or the Wallaby kangaroo.

Plaintiff does, however, have a permit for the sale in interstate commerce of the African elephant. Plaintiff asserts that the possession of this permit voids the application of California Penal Code §§653o and 653r as to the sale of African elephant products.

The parties are agreed that Congress has, in 16 U.S.C. §1535(f), reserved the right to abrogate state law by the issuance of a permit, see *Fouke Co. v. Brown*, 463 F. Supp. 1142 (E.D. Cal. 1979), and delegated the permit authority to the Secretary of the Interior. Thus the sole question is whether the Secretary has actually exercised his conceded power.

The plaintiff contends, of course, that he has. In this regard, plaintiff points not only to the mere issuance of the permit, but also to that part of the permit which provides that the questioned activity may be conducted "within the United States."

The defendants argue that the Secretary has not exercised the power he undoubtedly has, but rather has conditioned the plaintiff's permit on the plaintiff's compliance with California state law. In support of this contention, defendants rely on Condition B of the plaintiff's permit:

> The validity of the permit is also conditioned upon strict observance of all applicable foreign, state, local, or other federal law.

The defendants maintain that by the inclusion of this language the Secretary limited the plaintiff's right to sell products fabricated of elephant hide to those states and only those states where state law did not otherwise forbid it.

Plaintiff vigorously disputes the defendants' reading of Condition B. It is the plaintiff's position that the use of the words "strict observance" can only be understood to refer to laws that are capable of being strictly observed, i.e., laws that impose an affirmative duty rather than a flat prohibition. Plaintiff also suggests that this reading is supported by the

inclusion of the word "applicable" to modify the state law which must be observed.

The Court is of the opinion that the enforceability of California Penal Code §§653o and 653r with respect to the plaintiff's sale of African elephant boots in California turns entirely on the meaning of the language of Condition B. While the Court finds that the language of Condition B is somewhat ambiguous, the Court has no difficulty in interpreting Condition B as providing "void where prohibited by state law," although other reasonable alternative interpretations are likewise available.

For the reasons as stated herein, the Court holds that Condition B of the plaintiff's permit requires the plaintiff to refrain from the sale of elephant hide boots in California. Construing Condition B to mandate compliance with California law is warranted by several different considerations: No national policy will be undermined by reading the permit to require observance of California's laws; Congress has already indicated its willingness to permit California to ban the sale of goods fabricated from the hides of other, less endangered species — goods that would otherwise be able to move freely in interstate commerce; Congress has demonstrated by the legislative history of the Endangered Species Act of 1973 its willingness to leave California's laws "unaffected."

As a final note, the interpretation suggested by the defendants affords the maximum amount of protection to elephants, which is in and of itself, consistent with the purpose of the Endangered Species Act of 1973. By construing the permit to require compliance with California law, the anomalous result that less endangered species are better protected than more endangered species is avoided. Were the Court to adopt the plaintiff's argument as suggested, the laws of the State of California would provide greater protection to the Indonesian python and the Wallaby kangaroo, although it is the African elephant which is in greater danger of extinction.

Accordingly, the Court concludes that the permit issued to the plaintiff to sell elephant products in interstate commerce does not permit it to do so within the confines of the State of California.

IV

IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE

Finally, the plaintiff contends that the California statutes impermissibly burden interstate commerce.

No useful purpose would be served by repeating once again the relative power of the states and Congress over the regulation of interstate commerce in the absence of Congressional allocation of power to the states. In *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515 (1945), the Court observed that:

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible . . . or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. . . .

Id. at 769, 65 S.Ct. at 1520.

As the legislative history of the Endangered Species Act of 1973 makes clear, Congress was aware of the existence of California Penal Code §§653o and 653r and of the extent to which they limited interstate trade in products of animal hides. Congress nevertheless decided that the state statutes would remain "unaffected" by the enactment of the Endangered Species Act of 1973, House Report 93-412. This constitutes an unmistakeable approval by Congress of the challenged statutes. As noted by my brethren in another, similar, context:

> Thus it is clear that Congress has the power to provide the states with regulatory power over instances of interstate commerce such as those sub judice. Congress has

> . . . done just that. Given congressional authorization the state's exercise of that power does not represent an "unreasonable" and therefore impermissible burden on interstate commerce.

National Agricultural Chemicals Assn. v. Rominger, 500 F. Supp. 465, 471 (E.D. Cal. 1980). This Court finds that California Penal Code §§653o and 653r do not impermissibly burden interstate commerce.

CONCLUSION

For these reasons and all other reasons as stated herein, plaintiff's motion for summary judgment is Denied, and defendants' motion for summary judgment is Granted, and the complaint herein is Dismissed.

IT IS SO ORDERED.

DATED: August 19, 1981.

/s/ Raul A. Ramirez, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-4492
D.C. No. CV-S-80-941-RAR

H. J. JUSTIN & SONS, INC.,
dba JUSTIN BOOT COMPANY, a Texas Corporation,
Plaintiff-Appellant,

v.

GEORGE DEUKMEJIAN,*
Governor of the State of California, et al., Defendants-Appellees.

OPINION

Appeal from the United States District Court for the Eastern District of California
Raul A. Ramirez, United States District Judge, Presiding

Argued and Submitted: August 11, 1982

BEFORE: SCHROEDER, FLETCHER, and NORRIS, Circuit Judges. PER CURIAM

In this appeal appellant, a manufacturer of boots, asks us to reverse the district court's judgment that Cal. Penal Code §653o (West Supp. 1981) is not preempted by current federal statutes or regulations. Appellant seeks this ruling on appeal because it wishes to engage in trade within the State of California in boots made from the hides of African elephants, Indonesian pythons, and the Wallaby kangaroo. Cal. Penal Code §653o purports to prohibit such trade.[1] Holding that federal laws, with respect to trade in all three species at issue, did not preempt state law the district court ruled that section

*Substitution of parties pursuant to Fed.R. App. P. 43(c).

653o could be applied to appellant. See *H. J. Justin & Sons v. Brown*, 519 F. Supp. 1393 (E.D. Cal. 1981).

For the reasons set forth in *Man Hing Ivory & Imports, Inc., v. Deukmejian*, No. 82-4303, slip op. at ____ (9th Cir. ____, 1983), we are compelled to reverse, in part, the district court's ruling in this case. The district court here ruled in part that section 653o would prohibit trade within California in elephant products even by a federal permittee. That part of the district court's decision cannot stand since we held in *Man Hing* that section 653o could not be applied to the holder of a federal permit for import and export trade in African elephant products. See id. at ____; 50 C.F.R. § 17.40(e)(1981).

We sustain the balance of the district court's holding that the section 653o prohibition on trade in pythons and kangaroos is not preempted by the terms of the Endangered Species Act or implementing regulations.[2] Since the Secretary has not listed either the Indonesian python or the Wallaby kangaroo as "endangered" or "threatened" species, section 6(f) of the Act has no application to state regulations restricting or prohibiting trade in those species. 16 U.S.C. §1535(f);[3] see *Man Hing*, slip op. at ____. This aspect of the district court's decision is consistent with principles of federal preemption, see *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981), cert. denied, 102 S.Ct. 2959, cert. granted in companion case *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), cert. granted 102 S.Ct. 2956 (1982), and our decision in *Man Hing*, slip op. at ____. AFFIRMED in part, and REVERSED in part.

FOOTNOTES

[1]Cal. Penal Code §653o provides:

(a) It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any alligator, crocodile, polar bear, leopard, ocelot, tiger, cheetah, jaguar, sable antelope, wolf (Canis lupus), zebra, whale, cobra, python, sea turtle, colobus monkey, kangaroo, vicuna, sea otter,

free-roaming feral horse, dolphin or porpoise (Delphinidae), Spanish lynx, or elephant.

Any person who violates any provision of this sectioin is guilty of a misdemeanor and shall be subject to a fine of not less than one thousand dollars ($1,000) and not to exceed five thousand ($5,000) or imprisonment in the county jail for not to exceed six months, or both such fine and imprisonment, for each violation.

(emphasis added).

[2]Nor is section 653o as applied to Indonesian python and Wallaby kangaroo preempted by the Convention, for even if the Convention is self-executing, it creates no federal bar to section 653o. All pythons are listed in Appendix II, while the Wallaby kangaroo is not listed in any appendix to the Convention. Thus, Article XIV of the Convention specifically permits domestic measures, along the lines of Cal. Penal Code §653o, restricting or prohibiting trade or transport of parts or derivations of the Indonesian python or Wallaby kangaroo. See *Man Hing*, slip op. at _____ n.2 and accompanying test.

[3]Section 6(f) provides in full text:

Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

16 U.S.C. §1535(f)(1976) (emphasis added).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-4303
D.C. No. C-77-521-SAW

MAN HING IVORY AND IMPORTS, INC.,
a California corporation, Plaintiff-Appellee,

v.

GEORGE DEUKMEJIAN,* Governor of the
State of California, et al., Defendants-Appellants.

OPINION

Appeal from the United States District Court for the
Northern District of California
Stanley A. Weigel, United States District Judge, Presiding

Argued and Submitted: August 11, 1982

BEFORE: SCHROEDER, FLETCHER, and NORRIS, Circuit Judges. FLETCHER, Circuit Judge:

This case calls for a determination of the preemptive scope of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249 (Convention), the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543, and federal regulations enacted pursuant to the Endangered Species Act. Appellee Man Hing Ivory and Imports, Inc., is a wholesale importer of African elephant ivory products. In 1977, Man Hing filed suit in district court seeking a declaration that Cal. Penal Code §653o (West Supp. 1981), which prohibits trade in elephant parts within the State of California, is preempted by the Convention and the Endangered Species Act.

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*Substitution of parties pursuant to Fed. R. App. P. 43(c).

After two prior appeals to this court,[1] the district court, in May, 1982, granted appellee's motion for summary judgment on the ground that section 6(f) of the Endangered Species Act, 16 U.S.C. §1535(f), and regulations promulgated pursuant to the Act, see 50 C.F.R. §17.40(e)(1981) (allowing trade in African elephant products under special federal permits), preempted California's statutory prohibition on trade in elephant products. The defendants filed a timely appeal from the grant of summary judgment. We note jurisdiction under 28 U.S.C. §1291 (1976) and affirm.

ANALYSIS

The facts in thise case are not in dispute. Appellee wishes to conduct wholesale trade in African elephant ivory within the State of California. In 1970, the California legislature enacted Cal. Penal Code §653o which currently provides that:

> (a) It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead body, or any part or product thereof, of any alligator, crocodile, polar bear, leopard, ocelot, tiger, cheetah, jaguar, sable antelope, wolf (Canis lupus), zebra, whale, cobra, python, sea turtle, colobus monkey, kangaroo, vicuna, sea otter, free-roaming feral horse, dolphin or porpoise (Delphinidae), Spanish lynx, or elephant.
>
> Any person who violates any provision of this section is guilty of a misdemeanor and shall be subject to a fine of not less than one thousand dollars ($1,000) and not to exceed five thousand ($5,000) or imprisonment in the county jail for not to exceed six months, or both such fine and imprisonment, for each violation.

A 1976 amendment to the statute added elephants to the proscription of section 653o. See 1976 Cal. Stat. ch. 692, §1. Absent any preempting federal law, section 653o would clearly prohibit the activities in which appellee wishes to engage.

A. Convention on International Trade in Endangered Species of Wild Fauna and Flora.

In 1975, President Ford proclaimed the United States' agreement to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. 27 U.S.T. at 1089. The purpose of this multilateral convention is to protect "certain species of wild fauna and flora against over-exploitation through international trade. . . ." Id. at 1090 (Preamble).

To accomlish this goal, the Convention lists animals in three categories. In the first are animals that all contracting countries agree are endangered; in the second are animals whose survival may be endangered; and in the third, animals that one country has identified as subject to protective regulation within its jurisdiction. The African elephant is listed in the second category. Trade in the parts or products of animals listed in this category is permitted so long as the trader obtains a trade permit from the country of the animal's origin. Man Hing argues that because it has the required permit, the California prohibition on trade in elephant products cannot be applied to it consistent with the obligations of the United States under the Convention.

The district court rejected this argument because "[t]he Convention, standing alone, is in nowise the law of the United States. It is not self-executing. Legislation must be enacted if any of its provisions are to have the force of United States law." The district court may well be correct. We agree that "courts are empowered to give direct legal effect to treaties only insofar as they are self-executing and therefore operate as the law of the land." *Hopson v. Kreps*, 622 F.2d 1375, 1380 (9th Cir. 1980); see *Head Money Cases*, 112 U.S. 580, 598 (1884); see also L. Henkin, Foreign Affairs and the Constitution 156-67 (1972). But we need not decide if the Convention is itself self-executing, since the terms of section 1(a) of Article XIV of the Convention state that the provisions of the Convention shall in no way affect the right of parties to adopt

stricter domestic measures regulating or even prohibiting the trade or transport of any part or derivative of certain species, including the African elephant.[2] 27 U.S.T. at 1108. Thus, any rights to import African elephant products purportedly established under the Treaty are conditioned on the absence of prohibitory domestic measures. State laws are deemed domestic measures. See Convention, art. XIV, 27 U.S.T. at 1108-09; L. Henkin, Foreign Affairs and the Constitution 244-45 & nn.63-64 at 479-80 (1972) (and cases cited therein). The Convention, therefore, cannot itself preempt California law.

B. Endangered Species Act of 1973

The Endangered Species Act of 1973 implements, inter alia, the International Convention on Trade in Endangered Species of Wild Fauna and Flora. See 16 U.S.C. §§1531(4)(F), 1532(4), 1537a, 1538(c). The Act "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation. Its stated purposes [are] 'to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,' and 'to provide a program for the conservation of such . . . species . . .'" *TVA v. Hill*, 437 U.S. 153, 180 (1978) (quoting 16 U.S.C. §1531(b)(1976)). Whether, as Man Hing argues, such extensive federal legislation preempts otherwise valid state law is a question of Congressional intent. "Congress's purpose is most clear, of course, when the federal statute at issue explicitly prohibits state regulation in the same field." *Pacific Legal Foundation v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903, 919 (9th Cir. 1981), cert. denied, 102 S.Ct. 2959, cert. granted in companion case *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission*, 659 F.2d 903 (9th Cir. 1981), cert. granted 102 S.Ct. 2956 (1982)

Section 6(f) of the Endangered Species Act, while not explicitly prohibiting state regulation, does directly address the scope of federal preemption intended for the Endangered Species Act. The section provides:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or by any regulation which implements this chapter, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined.

16 U.S.C §1535(f)(1976). This general language, by its terms, does not forbid state statutes such as California Penal Code §653o.[3] Rather, it allows full implementation of section 653o so long as the state statute does not prohibit what the federal statute or its implementing regulations permit. The Act itself nowhere authorizes the importation or sale of African elephant products by permit or by exemption. Indeed, it prohibits the sale or import of endangered species unless such import or sale is specifically authorized or exempted. 16 U.S.C. §1538(a). Thus, only by reference to the federal regulations adopted to implement the Act may the precise scope of what the Act permits be determined. See *Fouke Co. v. Brown*, 463 F.Supp. 1142, 1144 (E.D. Cal. 1979).

C. Federal Regulation Under the Endangered Species Act of Trade in African Elephant Products.

Section 4 of the Endangered Species Act, 16 U.S.C. §1533 (1976), delegates to the Secretaries of Interior and Commerce the power to adopt specific regulations for implementation of the Act. In the exercise of this delegated authority, the Sec-

retaries are empowered to compile a list of threatened or endangered species. Id. §1533(c)(1). The Secretary of Interior is also authorized to adopt regulations for the protection of listed species, id. §1533(d); the scope of such protective regulations may include prohibition of any of the proscribed activities set forth in section 9 of the Act, 16 U.S.C. §1538.

Pursuant to these powers, the Secretary of the Interior, in May, 1978, added the African elephant to the list of threatened and endangered species. 43 Fed. Reg. 20,504 (1978). The ordinary effect of this listing would be to prohibit trade in African elephant parts or products. 50 C.F.R. §17.31(a)(1981); see 16 U.S.C. §§1533(d), 1538(a)(1)(A). By the terms of section 6(f) of the Act, such a result would be consistent with, and not preemptive of, Cal. Penal Code §653o.

Contemporaneous with the listing of the African elephant, however, the Secretary adopted regulations permitting limited trade in elephant products. 50 C.F.R. §17.40(e)(1981). These regulations provide:

> (e) African elephant (Loxodona africana). (1) Except as provided in paragraph (e)(2) or (3) of this section, the prohibitions incorporated into §17.31(a) shall apply to any African elephant, alive or dead, and to any part, product, or offspring thereof.
>
> (2) The prohibition against importation referred to in paragraph (e)(1) of this section shall not apply to any such wildlife which:
>
> (i) Has originated in the wild in a country that is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, TIAS No. 8249; and
>
> (ii) Has been exported from such country of origin, and, in any case of reexportation has been reexported, in accordance with Article IV of such Convention: Provided, That: Neither compliance with Article VII, Paragraph 2 of such Convention nor compliance with Article VII, Paragraph 3 of such Convention shall constitute compliance with this paragraph (e)(2)(ii); and

> (iii) Has remained in customs control and in an unaltered condition in any country not a party to such Convention that it enters while in transit to the United States.
>
> (3) A special purpose permit may be issued in accordance with the provisions of §17.32 authorizing any activity otherwise prohibited with regard to such wildlife, upon submission of proof that such wildlife was already in the United States on June 11, 1978 or that such wildlife was imported into the United States in accordance with paragraph (e)(2) of this section.

Id. Since no claim is raised here that the Secretary abused his discretion in adopting section 17.40(e) we assume as did the district court, that section 17.40(e) is indeed a "regulation which implements [the Act]" in the sense of section 6(f).

The district court determined that the effect of section 17.40(e) is to preempt operation of California Penal Code §653o insofar as the state statute prohibits trade in elephant products by an authorized federal permitee. We agree. The pertinent language of section 6(f) states, "[a]ny state law . . . is void to the extent that it may effectively . . . (2) prohibit what is authorized pursuant to an exemption or permit provided for . . . in any regulation which implements this chapter." 16 U.S.C. §1535(f)(1976). This language, together with the provisions of 50 C.F.R. §17.40(e), preclude California's enforcement of section 653o where it would prohibit federally authorized trade in African elephant products. See *Pacific Legal Foundation v. State Energy Resources Council*, 659 F.2d at 919 (state statute invalid where it actually conflicts with or impedes full implementation of a Congressional enactment). The state appellants do not seriously contend otherwise.

Appellants do, however, argue that one of the conditions of the federal permit alters the otherwise preemptive effect of the federal statute and regulation. Condition 11(B), printed on the front of the federal permit states:

> THE VALIDITY OF THIS PERMIT IS ALSO CONDITIONED UPON STRICT OBSERVANCE OF ALL APPLICABLE FOREIGN, STATE, AND OTHER FEDERAL LAW.

To appellant, this language means that the federal permit authorizing trade in elephant parts is void where such trade is prohibited by state law. Essentially, the state argues that this condition, together with the third sentence of section 6(f) of the Endangered Species Act (permitting state laws more restrictive than the federal statute), allows any state to nullify federally permitted trade in endangered species.

We find appellants' position intriguing[4] but conclude that it ultimately cannot withstand scrutiny. Federal regulations provide that no federal permit for trade in endangered species, including an elephant permit issued pursuant to 50 C.F.R §17.40(e),

> shall be construed to relieve a person from any other requirements imposed by a statute or regulation of any state or the United States, including any applicable health, quarantine, agricultural, or customs laws or regulations, or other Service enforced statutes or regulations.

50 C.F.R. §10.3 (1981). This general provision is the source of condition 11(B). The condition is a part of the printed form used for all federal fish and wildlife permits issued for trade in endangered species. Plainly, condition 11(B) is intended to do no more than implement the section 10.3 requirement that any trade under a federal permit meet state or federal health, quarantine, customs, and agricultural laws. To read the condition more broadly, as appellants would have us do, would open the way for states to impose regulation to supersede federal regulation of trade in imported endangered species or their export or interstate commerce, a form of state preemption clearly contrary to the intent of Congress in passing the Endangered Species Act.[5]

Accordingly, we affirm the district court's well-considered judgment that section 6(f) of the Endangered Species Act, together with 50 C.F.R. §17.40(e), preempts California's statutory prohibition on trade in African elephant products by a trader who has secured all necessary federal permits.

AFFIRMED.

FOOTNOTES

[1]In May, 1977, the district court ruled that Cal. Penal Code §653o was not preempted by federal law. Man Hing appealed this ruling and, during the pendency of the appeal, the U.S. Fish and Wildlife Service adopted 50 C.F.R. §17.40(e), permitting trade in elephant products. Accordingly, this court remanded the case to the district court for reconsideration in light of the new federal regulations.

In October, 1979, the district court ruled that appellee had no standing to challenge section 653o. Appellee again appealed and we again remanded to the district court, finding the appellee had standing to challenge the application to it of Cal. Penal Code §653o.

[2]The African elephant is listed in Appendix II to the Convention; thus, its parts and derivatives constitute "specimens of species" under section 1(a) of Article XIV pursuant to the definitions of "specimen" and "species" in sections (a) and (b)(ii) of Article I. See 27 U.S.T. at 1090, 1108-09.

[3]In fact, the legislative history of the Endangered Species Act unequivocally shows that Congress meant for federal law to preempt state law pursuant to the first sentence of section 6(f) only where the species was listed as endangered on the federal list and where the federal permission or ban related to interstate or foreign trade in, or exportation or importation of, that species:

> The quesiton of preemption of state laws [regarding the taking of listed species] was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation or interstate commerce; in any such case the State could not override the Federal action. In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired.

H.R. Rep. No. 412, 93d Cong., 1st Sess. 7-8 (1973) (emphasis added).

[4]As appellants point out, any reading of the statutes and regulations other than their interpretation apparently affords greater protection to species not listed as threatened or endangered under the federal Act than those that are identified as threatened or endangered because the state is free to prohibit entirely trade in these unlisted species. This apparent anomaly, however, springs from the federal statutes and regulations that permit trade in listed endangered species. Where Congress has expressly sanctioned such a result, we cannot rewrite the statute.

[5]We note also that the specific language of the condition appellant relies on undercuts appellant's position. The condition subjects the federal permittee only to "applicable" state laws. Were section 653o held applicable to appellee's federal permit, it would truncate the very permit to which it applies. We cannot believe Congress intended such circularity. Moreover, were we to uphold application of section 653o in the face of federal permits allowing trade in elephant products, we would pave the way for a day when an enterprise such as appellee's could secure a federal permit authorizing trade in elephant products and yet find itself unable to conduct such trade within the United States because of widespread state adoption of statutes paralleling California's section 653o. We think it improbable that Congress intended import or export permits under the Endangered Species Act to be revocable by state legislation.

BY THE PRESIDENT OF THE
UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on International Trade in Endangered Species of Wild Fauna and Flora was open for signature at Washington from March 3, 1973 to April 30, 1973, and thereafter at Bern until December 31, 1974, and was signed on behalf of the United States of America on March 3, 1973, a certified copy of which Convention in the Chinese, English, French, Russian and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of August 3, 1973, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention;

The President of the United States of America on September 13, 1973, ratified the Convention, in pursuance of the advice and consent of the Senate, and the United States of America deposited its instrument of ratification with the Government of the Swiss Confederation on January 14, 1974;

Pursuant to the provisions of Article XXIII of the Convention, the Convention will enter into force on July 1, 1975;

NOW, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the Convention, to the end that it shall be observed and fulfilled with good faith on and after July 1, 1975, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

Done at the city of Washington this twelfth day of May in the year of our Lord one thousand nine [SEAL] hundred seventy-five and of the Independence of the United States of America the one hundred ninety-ninth.

GERALD R. FORD

By the President:
HENRY A. KISSINGER
Secretary of State

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

The Contracting States,

RECOGNIZING that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

CONSCIOUS of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

RECOGNIZING that peoples and States are and should be the best protectors of their own wild fauna and flora;

RECOGNIZING, in addition, that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;

CONVINCED of the urgency of taking appropriate measures to this end;

HAVE AGREED as follows:

ARTICLE I

Definitions

For the purpose of the present Convention, unless the context otherwise requires:

(a) "Species" means any species, subspecies, or geographically separate population thereof;

(b) "Specimen" means:

(i) Any animal or plant, whether alive or dead;

(ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and for species included in Appendix III,[1] any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; and

(iii) in the case of a plant: for species included in Appendix I, any readily recognizable part or derivative thereof; and for species included in Appendices II and III, any readily recognizable part or derivative thereof specified in Appendices II and III in relation to the species;

(c) "Trade" means export, re-export, import and introduction from the sea;

(d) "Re-export" means export of any specimen that has previously been imported;

(e) "Introduction from the sea" means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State;

(f) "Scientific Authority" means a national scientific authority designated in accordance with Article IX;

(g) "Management Authority" means a national management authority designated in accordance with Article IX;

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[1]See Articles V and XVI. As Appendix III is to be composed of species identified by any party to the Convention rather than by agreement of the parties as is the case for the other Appendices, the Conference which produced the Convention concluded that Appendix III could only be established after the Convention had entered into force and the "parties" were identified and even then it would be subject to nearly continuous revision. As of this printing the Secretariat has not promulgated an Appendix III. [Footnote added by the Department of State.]

(h) "Party" means a State for which the present Convention has entered into force.

ARTICLE II

Fundamental Principles

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

ARTICLE III

Regulation of Trade in Specimens of Species included in Appendix I

1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of the species;

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

4. The re-export of any specimen of a species included in Appendix I shall require the prior grant and presentation of a

re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention;

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(c) a Management Authority of the State of re-export is satisfied that an import permit has been granted for any living specimen.

5. The introduction from the sea of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;

(b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.

ARTICLE IV

Regulation of Trade in Specimens of Species included in Appendix II

1. All trade in specimens of species included in Appendix II shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species:

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. A Scientific Authority in each Party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.

4. The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.

5. The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

6. The introduction from the sea of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.

7. Certificates referred to in paragraph 6 of this Article may be granted on the advice of a Scientific Authority, in consultation with other national scientific authorities or, when appropriate, international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods.

ARTICLE V

Regulation of Trade in Specimens of Species included in Appendix III

1. All trade in specimens of species included in Appendix III shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix III from any State which has included that species in Appendix III shall require the prior grant and presentation of

an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of the State for the protection of fauna and flora; and

(b) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. The import of any specimen of a species included in Appendix III shall require, except in circumstances to which paragraph 4 of this Article applies, the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit.

4. In the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that State or is being re-exported shall be accepted by the State of import as evidence that the provisions of the present Convention have been complied with in respect of the specimen concerned.

ARTICLE VI

Permits and Certificates

1. Permits and certificates granted under the provisions of Articles III, IV, and V shall be in accordance with the provisions of this Article.

2. An export permit shall contain the information specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted.

3. Each permit or certificate shall contain the title of the present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority.

4. Any copies of a permit or certificate issued by a Management Authority shall be clearly marked as copies only and no such copy may be used in place of the original, except to the extent endorsed thereon.

5. A separate permit or certificate shall be required for each consignment of specimens.

6. A Management Authority of the State of import of any specimen shall cancel and retain the export permit or re-export certificate and any corresponding import permit presented in respect of the import of that specimen.

7. Where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist in identifying the specimen. For these purposes "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.

ARTICLE VII

Exemptions and Other Special Provisions Relating to Trade

1. The provisions of Articles III, IV and V shall not apply to the transit or trans-shipment of specimens through or in the territory of a Party while the specimens remain in Customs control.

2. Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.

3. The provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects. This exemption shall not apply where:

(a) in the case of specimens of a species included in Appendix I, they were acquired by the owner outside his State

of usual residence, and are being imported into that State; or

(b) in the case of specimens of species included in Appendix II:

(i) they were acquired by the owner outside his State of usual residence and in a State where removal from the wild occurred;

(ii) they are being imported into the owner's State of usual residence; and

(iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens;

unless a Management Authority is satisfied that the specimens were acquired before the provisions of the present Convention applied to such specimens.

4. Specimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II.

5. Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity or any specimen of a plant species was artificially propagated, or is a part of such an animal or plant or was derived therefrom, a certificate by that Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Articles III, IV or V.

6. The provisions of Articles III, IV and V shall not apply to the non-commercial loan, donation or exchange between scientists or scientific institutions registered by a Management Authority of their State, of herbarium specimens, other preserved, dried or embedded museum specimens, and live plant material which carry a label issued or approved by a Management Authority.

7. A Management Authority of any State may waive the requirements of Articles III, IV and V and allow the movement without permits or certificates of specimens which form part of a travelling zoo, circus, menagerie, plant exhibition or other travelling exhibition provided that:

(a) the exporter or importer registers full details of such specimens with that Management Authority;

(b) the specimens are in either of the categories specified in paragraphs 2 or 5 of this Article; and

(c) the Management Authority is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment.

ARTICLE VIII

Measures to be Taken by the Parties

1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

(a) to penalize trade in, or possession of, such specimens, or both; and

(b) to provide for the confiscation or return to the State of export of such specimens.

2. In addition to the measures taken under paragraph 1 of this Article, a Party may, when it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a specimen traded in violation of the measures taken in the application of the provisions of the present Convention.

3. As far as possible, the Parties shall ensure that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit and ports of entry at which specimens must be presented for clearance. The Parties shall ensure fur-

ther that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.

4. Where a living specimen is confiscated as a result of measures referred to in paragraph 1 of this Article:

(a) the specimen shall be entrusted to a Management Authority of the State of confiscation;

(b) the Management Authority shall, after consultation with the State of export, return the specimen to that State at the expense of that State, or to a rescue centre or such other place as the Management Authority deems appropriate and consistent with the purposes of the present Convention; and

(c) the Management Authority may obtain the advice of a Scientific Authority, or may, whenever it considers it desirable, consult the Secretariat in order to facilitate the decision under subparagraph (b) of this paragraph, including the choice of a rescue centre or other place.

5. A rescue centre as referred to in paragraph 4 of this Article means an institution designated by a Management Authority to look after the welfare of living specimens, particularly those that have been confiscated.

6. Each Party shall maintain records of trade in specimens of species included in Appendices I, II and III which shall cover:

(a) the names and addresses of exporters and importers; and

(b) the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question.

7. Each Party shall prepare periodic reports on its implementation of the present Convention and shall transmit to the Secretariat:

(a) an annual report containing a summary of the information specified in sub-paragraph (b) of paragraph 6 of this Article; and

(b) a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.

8. The information referred to in paragraph 7 of this Article shall be available to the public where this is not inconsistent with the law of the Party concerned.

ARTICLE IX

Management and Scientific Authorities

1. Each Party shall designate for the purposes of the present Convention:

(a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and

(b) one or more Scientific Authorities.

2. A State depositing an instrument of ratification, acceptance, approval or accession shall at that time inform the Depositary Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat.

3. Any changes in the designations or authorizations under the provisions of this Article shall be communicated by the Party concerned to the Secretariat for transmission to all other Parties.

4. Any Management Authority referred to in paragraph 2 of this Article shall if so requested by the Secretariat or the Management Authority of another Party, communicate to it

impression of stamps, seals or other devices used to authenticate permits or certificates.

* * *

ARTICLE XIV

Effect on Domestic Legislation and International Conventions

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

(a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

(b) domestic measures restricting or prohibiting trade, taking, possession, or transport of species not included in Appendices I, II or III.

2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession, or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.

3. The provisions of the present Convention shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external customs control and removing customs control between the parties thereto insofar as they relate to trade among the States members of that union or agreement.

4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of

the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.

5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.

6. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

ARTICLE XV

Amendments to Appendices I and II

1. The following provisions shall apply in relation to amendments to Appendices I and II at meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration at the next meeting. The text of the proposed amendment shall be communicated to the Secretariat at least 150 days before the meeting. The Secretariat shall consult the other Parties and interested bodies on the amendment in accordance with the provisions of sub-paragraphs (b) and (c) of paragraph 2 of this Article and shall communicate

the response to all Parties not later than 30 days before the meeting.

(b) Amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

* * *

ARTICLE XVI

Appendix III and Amendments Therein

1. Any party may at any time submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in paragraph 3 of Article II.

* * *

3. A Party which has submitted a species for inclusion in Appendix III may withdraw it at any time by notification to the Secretariat which shall communicate the withdrawal to all Parties. The withdrawal shall take effect 30 days after the date of such communication.

* * *

ARTICLE XXIV

Denunciation

Any Party may denounce the present Convention by written notification to the Depositary Government at any time. The denunciation shall take effect twelve months after the Depositary Government has received the notification.

* * *

THE GENERAL AGREEMENT ON TARIFFS AND TRADE

The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, the UNITED STATES OF BRAZIL, BURMA, CANADA, CEYLON, the REPUBLIC OF CHILE, the REPUBLIC OF CHINA, the REPUBLIC OF CUBA, the CZECHOSLOVAK REPUBLIC, the FRENCH REPUBLIC, INDIA, LEBANON, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, NEW ZEALAND, the KINGDOM OF NORWAY, PAKISTAN, SOUTHERN RHODESIA, SYRIA, the UNION OF SOUTH AFRICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,

Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,

Have through their Representatives agreed as follows:

PART I

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying

such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

* * *

Article II

Schedules of Concessions

1. *(a)* Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

* * *

Article XX

General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

* * *

Article XXI

* * *

12. Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

* * *

PART IV*

TRADE AND DEVELOPMENT

Article XXXVI

Principles and Objectives

1.* The contracting parties,

(a) recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed parties;

(b) considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

(c) noting, that there is a wide gap between standards of living in less-developed countries and in other countries;

(d) recognizing that individual and joint action is essential to further the development of the economies of less-

developed contracting parties and to bring about a rapid advance in the standards of living in these countries;

(e) recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures — and measures in conformity with such rules and procedures — as are consistent with the objectives set forth in this Article;

(f) noting that the CONTRACTING PARTIES may enable less-developed contracting parties to use special measures to promote their trade and development;

agree as follows:

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

* * *

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.*

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible — that is, except when compelling reasons, which may include legal reasons, make it impossible — give effect to the following provisions:

(a) accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-developed contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed form;*

(b) refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

(c) (i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures.

which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

* * *

SCHEDULE XX — UNITED STATES OF AMERICA

Part 1 (Continued)

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
1530(b) (1), (2), (3), (4), (5), (6), and (7)	Leather (except leather provided for in subparagraph (d) of paragraph 1530, Tariff Act of 1930), made from hides or skins of cattle of the bovine species:	
	Sole or belting leather (including offal), rough, partly finished, finished, curried, or cut or wholly or partly manufactured into outer or inner soles, blocks, strips, counters, taps, box toes, or any forms or shapes suitable for conversion into boots, shoes, footwear, or belting	10% ad val.
	Leather welting	10% ad val.
	Leather to be used in the manufacture of harness or saddlery	10% ad val.
	Side upper leather (including grains and splits), patent leather, and leather made from calf or kip skins, rough, partly finished, or finished, or cut or wholly or partly manufactured into uppers, vamps, or any forms or shapes suitable for conversion into boots, shoes, or footwear:	

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
	Side upper grains and finished splits (except wax splits), and upper leather made from calf or kip skins; all the foregoing, not cut or wholly or partly manufactured into uppers, vamps, or any forms or shapes suitable for conversion into boots, shoes, or footwear	12½% ad val.
	Patent leather	7½% ad val.
	Other	10% ad val.
	Upholstery, collar, bag, case, glove, garment or strap leather, in the rough, in the white, crust, or russet, partly finished or finished:	
	Upholstery, glove, and garment	15% ad val.
	Other	10% ad val.
	Leather to be used in the manufacture of footballs, basketballs, soccer balls, or medicine balls	15% ad val.
	All other, rough, partly finished, finished, or curried, not specially provided for	10% ad val.

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
1530(c)	Leather (except leather provided for in subparagraph (d) of paragraph 1530, Tariff Act of 1930), made from hides or skins of animals (including fish, reptiles, and birds, but not including cattle of the bovine species), in the rough, in the white, crust, or russet, partly finished, or finished:	
	Rough-tanned walrus	10% ad val.
	Pigskin	12½% ad val.
	Other	15% ad val.
1530(c)	Vegetable-tanned rough leather made from goat or sheep skins (including those commercially known as India-tanned goat or sheep skins)	10% ad val.
1530(c)	Any of the leathers provided for in any item 1530(c) of this Part:	
	If imported to be used in the manufacture of boots, shoes, or footwear, but not out or wholly or partly manufactured into uppers, vamps, or any forms or shapes suitable for conversion into boots, shoes, or footwear:	
	Made from sheep, lamb, goat, kid, reptile, shark, or pig skins (except patent leather)	10% ad val.

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
	Other (including patent leather)	7½% ad val.
	If cut or wholly or party manufactured into uppers, vamps, or any forms or shapes suitable for conversion into boots, shoes, or footwear	10% ad val.
1530(d)	Leather of all kinds, grained, printed, embossed, ornamented, or decorated, in any manner or to any extent (including leather finished in gold, silver, aluminum, or like effects), or by any other process (in addition to tanning) made into fancy leather, and any of the foregoing cut or wholly or partly manufactured into uppers, vamps, or any forms or shapes suitable for conversion into boots, shoes, or footwear, all the foregoing by whatever name known, and to whatever use applied	15% ad val.
1530(e)	Boots, shoes, or other footwear (including athletic or sporting boots and shoes), made wholly or in chief value of leather, not specially provided for:	
	Sewed or stitched by the process or method known as McKay:	
	Skating boots and shoes, if attached to ice skates	15% ad val.

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
	Other	20% ad val.
	Made by the process or method known as welt	40¢ per pair, but not less than 5% nor more than 20% ad val.
	Having molded soles laced to uppers	10% ad val.
	Slippers for housewear	10% ad va.
	Moccasins of the Indian handicraft type, having no line of demarcation between the soles and the uppers	10% ad val.
	Other (except huaraches, turn or turned boots and shoes, and men's, youths', and boys' boots, shoes, or other footwear)	20% ad val.
1530(e)	Boots, shoes, or other footwear (including athletic or sporting boots and shoes), the uppers of which are composed wholly or in chief value of wool, cotton, ramie, animal hair, fiber, rayon or other synthetic textile, silk, or substitutes for any of the foregoing; any of the foregoing with soles composed wholly or in chief value of leather	20% ad val.

Tariff Act of 1930, paragraph	Description of Products	Rate of Duty
1530(f)	Harness valued at more than $70 per set, single harness valued at more than $40, saddles valued at more than $40 each, saddlery, and parts (except metal parts) for any of the foregoing	15% ad val.
1530(f)	Saddles made wholly or in part of pigskin or imitation pigskin	15% ad val.
1530(f)	Saddles and harness, not specially provided for, and parts thereof, finished or unfinished, except metal parts	15% ad val.

PART 17 — ENDANGERED AND THREATENED WILDLIFE AND PLANTS

Subpart A — Introduction and General Provisions

Sec.
17.1 Purpose of regulations.
17.2 Scope of regulations.
17.3 Definitions.

Title 50 — Wildlife and Fisheries

17.4 Pre-Act wildlife.
17.5 Alaska natives.
17.6 State cooperative agreements. [Reserved]

Subpart B — Lists

17.11 Endangered and threatened wildlife.
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Subpart C — Endangered Wildlife

17.21 Prohibitions.
17.22 Permits for scientific purposes or for the enhancement of propagation or survival.
17.23 Economic hardship permits.

Subpart D — Threatened Wildlife

17.31 Prohibitions.
17.32 Permits — general.
17.40 Special rules — mammals.
17.41 Special rules — birds.
17.42 Special rules — reptiles.
17.43 Special rules — amphibians.
17.44 Special rules — fishes.
17.45 Special rules — snails and clams. [Reserved]
17.46 Special rules — crustaceans. [Reserved]
17.47 Special rules — insects.
17.48 Special rules — common sponges and other forms. [Reserved]

Subpart E — Similarity of Appearance

17.50 General.
17.51 Treatment as endangered or threatened.
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Subpart F — Endangered Plants

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Subpart G — Threatened Plants

17.71 Prohibitions.
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Subpart H — [Reserved]

Subpart I — Interagency Cooperation

17.94 Critical habitats.
17.95 Critical habitat — fish and wildlife.
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Subpart J — Manatee Protection Areas

Sec.
17.100 Purpose.
17.101 Scope.
17.102 Definitions.
17.103 Establishment of protection areas.
17.104 Prohibitions.
17.105 Permits and exceptions.
17.106 Emergency establishment of protection areas.
17.107 Facilitating enforcement.
17.108 List of designated manatee protection areas.

AUTHORITY: Pub. L. 93-205, 87 Stat. 884; Pub. L. 95-632, 92 Stat. 3751; and Pub. L. 96-159, 93 Stat. 1241 (16 U.S.C. 1531, *et seq.*).

SOURCE: 40 FR 44415, Sept. 26, 1975, unless otherwise noted.

Subpart A — Introduction and General Provisions

§ 17.1 Purpose of regulations.

(a) The regulations in this part implement the Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531-1543, except for those provisions in the Act concerning the Convention on International Trade in Endangered Species of Wild Fauna and Flora, for which regulations are provided in Part 23 of this subchapter.

(b) The regulations identify those species of wildlife and plants determined by the Director to be endangered or threatened with extinction under section 4(a) of the Act and also carry over the species and subspecies of wildlife designated as endangered under the Endangered Species Conservation Act of 1969 (83 Stat. 275, 16 U.S.C. 668cc-1 to 6) which are deemed endangered species under section 4(c)(3) of the Act.

§ 17.2 Scope of regulations.

(a) The regulations of this part apply only to endangered and threatened wildlife and plants.

* * *

(e) Certain of the wildlife and plants listed in § 17.11 and § 17.12 as endangered or threatened are included in Appendix I, II or III to the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The importation, exportation and reexportation of such species are subject to additional regulations provided in Part 23 of this subchapter.

§ 17.3 Definitions.

In addition to the definitions contained in Part 10 of this subchapter, and unless the context otherwise requires, in this Part 17:

"Act" means the Endangered Species Act of 1973 (16 U.S.C. 1531-1543; 87 Stat. 884);

* * *

"Endangered" means a species of wildlife listed in § 17.11 or

a species of plant listed in § 17.12 and designated as endangered.

* * *

"Threatened" means a species of wildlife listed in § 17.11 or plant listed in § 17.12 and designated as threatened.

* * *

Subpart C — Endangered Wildlife

§ 17.21 Prohibitions.

(a) Except as provided in Subpart A of this part, or under permits issued pursuant to § 17.22 or § 17.23, it is unlawful for any person subject to the jurisdiction of the United States to commit, to attempt to commit, to solicit another to commit or to cause to be committed, any of the acts described in paragraphs (b) through (f) of this section in regard to any endangered wildlife.

(b) *Import or export.* It is unlawful to import or to export any endangered wildlife. Any shipment in transit through the United States is an importation and an exportation, whether or not it has entered the country for customs purposes.

(c) *Take.* (1) It is unlawful to take endangered wildlife within the United States, within the territorial sea of the United States, or upon the high seas. The high seas shall be all waters seaward of the territorial sea of the United States, except waters officially recognized by the United States as the territorial sea of another country, under international law.

* * *

(d) *Possession and other acts with unlawfully taken wildlife.* (1) it is unlawful to possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any endangered wildlife which was taken in violation of paragraph (c) of this section.

* * *

(e) *Interstate or foreign commerce.* It is unlawful to deliver,

receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever, and in the course of a commercial activity, any endangered wildlife.

(f) *Sale or offer for sale.* (1) It is unlawful to sell or to offer for sale in interstate or foreign commerce any endangered wildlife.

* * *

§ 17.22 Permits for scientific purposes or for the enhancement of propagation or survival.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section, for scientific research or for enhancing the propagation or survival of endangered wildlife. Such permits may authorize a single transaction, a series of transactions, or a number of activities over a specific period of time. (See § 17.32 for permits for threatened species.)

* * *

§ 17.23 Economic hardship permits.

Upon receipt of a complete application, the Director may issue a permit authorizing any activity otherwise prohibited by § 17.21, in accordance with the issuance criteria of this section in order to prevent undue economic hardship.

* * *

Subpart D — Threatened Wildlife

§ 17.31 Prohibitions.

(a) Except as provided in subpart A of this Part, or in a permit issued under this subpart, all of the provisions in § 17.21 shall apply to threatened wildlife, except § 17.21(c)(5).

* * *

§ 17.32 Permits — general.

Upon receipt of a complete application the Director may issue a permit for any activity otherwise prohibited with regard to threatened wildlife. Such permit shall be governed by the provisions of this section unless a special rule applicable to the wildlife, appearing in §§ 17.40 to 17.48, of this part provides otherwise. Permits issued under this section must be for one of the following purposes: Scientific purposes, or the enhancement of propagation or survival; or economic hardship; or zoological exhibition; or educational purposes; or special purposes consistent with the purposes of the Act. Such permits may authorize a single transaction, a series of transactions, or activities over a specific period of time.

* * *

§ 17.40 Special rules — mammals.

(a) *Kangaroo; Eastern Gray (Macropus giganteus), Red (Megalia rufa), and Western Gray (Macropus fuliginosus)* — (1) *Prohibitions.* The following prohibitions apply to the Eastern Gray, Red and Western Gray kangaroos:

(i) *Import.* (A) Except as permitted in paragraph (a)(1)(i)(B) of this section, or in paragraph (a)(2) of this section, it shall be unlawful to import any such wildlife for commercial purposes.

(B) Eastern Gray, Red, and Western Gray kangaroos — including parts and products of such wildlife — which have been tagged or otherwise identified as removed from the wild in accordance with the management plans of Australian states may be imported into the United States without permits for individual shipments otherwise required by 50 CFR Part 17. Importation into the United States must comply with the requirements of 50 CFR Part 14.

* * *

(e) African elephant *(Loxodonta africana).* (1) Except as provided in paragraph (e)(2) or (3) of this section, the prohibitions incorporated into § 17.31(a) shall apply to any African

elephant, alive or dead, and to any part, product, or offspring thereof.

(2) The prohibition against importation referred to in paragraph (e)(1) of this section shall not apply to any such wildlife which:

(i) Has originated in the wild in a country that is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1973, TIAS No. 8249; and

(ii) Has been exported from such country of origin, and, in any case of reexportation has been reexported, in accordance with Article IV of such Convention: *Provided*, That: Neither compliance with Article VII, Paragraph 2 of such Convention nor compliance with Article VII, Paragraph 3 of such Convention shall constitute compliance with this paragraph (e)(2)(ii); and

(iii) Has remained in customs control and in an unaltered condition in any country not a party to such Convention that it enters while in transit to the United States.

(3) A special purpose permit may be issued in accordance with the provision of § 17.32 authorizing any activity otherwise prohibited with regard to such wildlife, upon submission of proof that such wildlife was already in the United States on June 11, 1978 or that such wildlife was imported into the United States in accordance with paragraph (e)(2) of this section.

* * *

PART 23 — ENDANGERED SPECIES CONVENTION

Subpart A — Introduction

Sec.

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23.2 Scope of regulations.
23.3 Definitions.
23.4 Parties to the Convention.

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Sec.

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23.54 Lynx *(Lynx canadensis)*
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AUTHORITY: Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249; and Endangered Species Act of 1973, 87 Stat. 884, 16 U.S.C. 1531-43.

Subpart A — Introduction

§ 23.1 Purpose of regulations.

(a) The regulations in this part implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

(b) The regulations identify those species of wildlife and plants included in Appendix I, II or III to the Convention.

§ 23.2 Scope of regulations.

(a) The regulations of this part apply only to wildlife and plants listed in Appendix I, II or III to the Convention, listed herein in § 23.23 for the convenience of the public. It should be noted that many species listed in Appendix I, II or III are also listed in Part 17 (endangered and threatened species) or Part 18 (marine mammals), and are subject to additional regulations in those parts or in Part 216 (marine mammals) or Parts 217-225 (endangered and threatened species) for species under jurisdiction of the National Marine Fisheries Service.

§ 23.3 Definitions.

In addition to the definitions contained in Parts 10 and 17 of this subchapter, and unless the context requires otherwise, in this part:

"Appendix I" means the list of wildlife and plants called "Appendix I" and attached to the Convention (see § 23.23 for the list).

"Appendix II" means the list of wildlife and plants called "Appendix II" and attached to the Convention (see § 23.23 for the list).

"Appendix III" means the list of wildlife and plants called "Appendix III" and attached to the Convention (see § 23.23 for the list).

"Convention" means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, TIAS 8249.

"Management Authority" means a national management authority officially designated by a party to implement the present Convention, including the granting of permits or certificates for Convention purposes on behalf of the party.

"Party" means a country for which the Convention has entered into force, by virtue of ratification or accession.

"Re-export" means export of wildlife or plants that have previously been imported.

"United States" means all of the several states, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

§ 23.4 Parties to the Convention.

The following countries are currently parties to the Convention. The name and address of the management authority is included under the name of each country. This list is for the convenience of the public, and does not preclude the application of regulations in this Part 23 to importation, exportation or re-exportation to or from other countries.

AUSTRALIA

The Bureau of Customs, Department of Business and Consumer Affairs, Canberra, Act 2600, Australia.

* * *

MALAGASY REPUBLIC

Direction des Eaux et Forets et de la Conservation des Sols, B.P. 243, Tananarive.

PAPUA NEW GUINEA

The Conservator of Fauna, Department of Natural Resources, P.O. Box 2585, Konedobu, Papua, New Guinea.

* * *

ZAIRE

Le Commissaire d'Etat a l'Environment, Conservation de la Nature et Tourisme Boite Postale 12348, Kinshasa/Gombe, Zaire.

Subpart B — Prohibitions, Permits and Exceptions

§ 23.11 Prohibitions.

(a) Unless the requirements in this Part 23 are met, or one of the exceptions in this Part 23 is applicable, it is unlawful for any person subject to the jurisdiction of the United States to commit, attempt to commit, solicit another to commit, or cause to be committed any of the acts described in paragraphs (b) through (d) of this section.

(b) *Import.* (1) It is unlawful to import into the United States any wildlife or plant listed in Appendix I, II or III (see § 23.23) from any foreign country.

(2) It is unlawful to import directly into the United States any wildlife or plant listed in Appendix I or II (see § 23.23) taken from the sea beyond the jurisdiction of any country.

(c) *Export.* It is unlawful to export from the United States any wildlife or plant listed in Appendix I, II or III (see § 23.23).

(d) *Re-export.* It is unlawful to re-export from the United States any wildlife or plant listed in Appendix I, II or II (see § 23.23).

(e) *Possession.* It is unlawful for any person subject to the jurisdiction of the United States to possess any wildlife or plant listed in Appendix I, II or III imported into the United States, or exported or re-exported from the United States contrary to the provisions of the Convention or this Part 23.

§ 23.12 Requirements.

(a) *Import.* (1) Appendix I. (i) In order to import into the United States any wildlife or plant listed in Appendix I from any foreign country, a United States import permit, issued pursuant to § 23.15, and a valid foreign export permit issued by the country of origin or a valid foreign re-export certificate issued by the country of re-export must be obtained prior to such importation.

(ii) In order to import directly into the United States any wildlife or plant listed in Appendix I taken from the sea beyond the jurisdiction of any country, a United States import permit issued pursuant to § 23.15 must be obtained prior to such importation.

(2) Appendix II. (i) In order to import into the United States any wildlife or plant listed in Appendix II from any foreign country, a valid foreign export permit issued by the country of origin, or a valid foreign re-export certificate issued by the country of re-export, must be obtained prior to such importation.

(ii) In order to import directly into the United States any wildlife or plant listed in Appendix II taken from the sea beyond the jurisdiction of any country, a United States import permit issued pursuant to § 23.15, must be obtained prior to such importation.

(3) Appendix III. (i) In order to import into the United States any wildlife or plant listed in Appendix III from a foreign country that has listed such animal or plant in Appendix

III, a valid foreign export permit or re-export certificate issued by such country must be obtained prior to such importation.

(ii) In order to import into the United States any wildlife or plant listed in Appendix III from a foreign country that has not listed such wildlife or plant in Appendix III, a valid foreign certificate of origin or foreign re-export certificate must be obtained prior to such importation.

* * *

§ 23.13 Exceptions.

(a) If any wildlife or plant listed in Appendix I, II or III is also subject to the regulations in Part 17 or Part 18 of this subchapter, the prohibitions and exceptions in those parts and in Part 23 shall apply. Exceptions in one part cannot be invoked to allow activities prohibited in another part.

(b) The prohibitions in § 23.11 (b) through (d) concerning importation, exportation and re-exportation shall not apply to wildlife or plant listed in Appendix I, II or III that are being transshipped through the United States provided such wildlife or plants remain in Customs custody.

(c) The prohibitions in § 23.11 (b) through (d) concerning importation, exportation and re-exportation shall not apply to wildlife or plants when a certificate has been issued by the management authority of the country of origin or the country of re-export to the effect that the wildlife or plant was acquired prior to the date the Convention applied to it. See § 23.15 for rules on the issuance of such certificates.

* * *

§ 23.15 Permits and certificates.

(a) In order to import, export or re-export wildlife or plants listed in Appendix I, II or III that are also listed as endangered or threatened and subject to regulations in Part 17 of this subchapter, the requirements in both Part 17 and Part 23 must be met. A single application meeting the appropriate

application requirements in Part 17 will also meet the application requirements in Part 23.

* * *

(c) Application requirements for permits or certificates to import, export or re-export wildlife or plants listed in Appendix I, II or III that are not subject to the regulations in Part 17 or Part 18 of this subchapter. Applications for permits or certificates under this section must be submitted to the Director by any person subject to the jurisdiction of the United States who wishes to engage in the activity. Each application must be submitted on an official application form (Form 3-200) provided by the Service, or must contain the general information and certification required by § 13.12(a) of this subchapter, and as much of the following information as relates to the purpose for which the applicant is requesting a permit or certificate.

* * *

TARIFF SCHEDULES

Schedule 1 — Part 5

GSP Item	Articles	Rates of Duty 1	Rates of Duty 2
	Subpart A — Hides, Skins, and Leather		
	Subpart A headnotes:		
	1. For the purposes of this subpart —		
	(a) the term "leather" covers leathers made from hides and skins of all animals (including birds and fish); and		
	(b) the term "fancy," as applied to leather, means leather which has been embossed, printed, or otherwise decorated in any manner or to any extent (including leather finished in aluminum, gold, silver, or like effects and leather on which the original grain has been accentuated by any process).		

GSP	Item	Articles	Rates of Duty 1	Rates of Duty 2
		2. Articles of leather, and leather which has been cut or wholly or partly made into forms or shapes suitable for conversion into footwear or other articles are covered in schedule 7.		
		Hides and skins (except furskins) of all animals (including birds and fish), raw or uncured, or dried, salted, limed, pickled, or otherwise cured:		
		Bovine:		
	120.11	Buffalo	Free	10% ad val.
		Other:		
	120.14	Whole hides or skins weighing over 12 pounds each when dried or dry-salted, or over 25 pounds each when wet or wet-salted.	Free	10% ad val.
A	120.17	Other	2% ad val.	10% ad val.
	120.20	Other	Free	Free

GSP	Item	Articles	Rates of Duty 1	Rates of Duty 2
	120.60	Parchment and vellum	Free	Free
		Leather, in the rough, partly finished, or unfinished:		
		Chamois:		
A	121.10	Oil-tanned	7.5% ad val.*	25% ad val.
A	121.15	Other	5% ad val.	25% ad val.
	121.20	Patent	3.5% ad val.	15% ad val.
A	121.25	Upholstery leather	6% ad val.	20% ad val.
A	121.25	Upholstery leather	6% ad val.	20% ad val.
		Other:		
		Calf and kip:		
	121.30	Upper	9% ad val.	15% ad val.
A	121.35	Lining	4% ad val.	15% ad val.
		Other:		
	121.40	Not fancy	5% ad val.	15% ad val.
	121.45	Fancy	9% ad val.	30% ad val.
	121.50	Pig and hog	6% ad val.	25% ad val.
		Other:		

GSP	Item	Articles	Rates of Duty 1	Rates of Duty 2
		Not fancy:		
		Vegetable-tanned goat and sheep, in the rough:		
A*	121.52	Goat	4% ad val.	10% ad val.
A	121.54	Sheep	6% ad val.	10% ad val.
A	121.55	Buffalo	5% ad val.	25% ad val.
A	121.56	Reptilian	5% ad val.	25% ad val.
	121.59	Other	5% ad val.	25% ad val.
		Fancy:		
	121.60	Goat and kid	6% ad val.*	30% ad val.
A	121.65	Other	6% ad val.	30% ad val.

TARIFF ACT OF 1930

§ 1527. Importation of wild mammals and birds in violation of foreign law

Importation prohibited

(a) If the laws or regulations of any country, dependency, province, or other subdivision of government restrict the taking, killing, possession, or exportation to the United States, of any wild mammals or bird, alive or dead, or restrict the exportation to the United States of any part or product of any wild mammal or bird, whether raw or manufactured, no such mammal or bird, or part or product thereof, shall, after the expiration of ninety days after June 17, 1930, be imported into the United States from such country, dependency, province, or other subdivision of government, directly or indirectly, unless accompanied by a certification of the United States consul, for the consular district in which is located the port or place from which such mammal or bird, or part or product thereof, was exported from such country, dependency, province, or other subdivision of government, that such mammal or bird, or part or product thereof, has not been acquired or exported in violation of the laws or regulations of such country, dependency, province, or other subdivision of government.

Forfeiture

(b) Any mammal or bird, alive or dead, or any part or product thereof, whether raw or manufactured, imported into the United States in violation of the provisions of the preceding subdivision shall be subject to seizure and forfeiture under the customs laws. Any such article so forfeited may, in the discretion of the Secretary of the Treasury and under such regulations as he may prescribe, be placed with the departments or bureaus of the Federal or State Governments, or with societies or museums, for exhibition or scientific or educational purposes, or destroyed, or (except in the case of heads or horns of wild mammals) sold in the manner provided by law.

Section not to apply in certain cases

(c) The provisions of this section shall not apply in the case of—

(1) Prohibited importations. — Articles the importation of which is prohibited under the provisions of this chapter, or of section 42(a) of Title 18, or of any other law;

(2) Scientific or educational purposes. — Wild mammals or birds, alive or dead, or parts or products thereof, whether raw or manufactured, imported for scientific or educational purposes;

(3) Certain migratory game birds. — Migratory game birds (for which an open season is provided by the laws of the United States and any foreign country which is a party to a treaty with the United States, in effect on the date of importation, relating to the protection of such migratory game birds) brought into the United States by bona fide sportsmen returning from hunting trips in such country, if at the time of importation the possession of such birds is not prohibited by the laws of such country or of the United States.

June 17, 1930, c. 497, Title IV, § 527, 46 Stat. 741.

SUMMARY OF STATE CONSERVATION LAWS

The following states protect endangered and threatened species but expressly limit their application to resident or native species:

COLORADO	Colo. Rev. Stat. §33-8-101, *et seq.* (Supp. 1982)
FLORIDA	Fla. Stat. Ann. §372.072 (West Supp. 1983)
GEORGIA	Ga. Code Ann. §27-3-130 (1982)
MAINE	Me. Rev. Stat. Ann. tit. 12, § 7751, *et seq.* (1964)
NEVADA	Nev. Rev. Stat. §503.585 (1979)
NORTH DAKOTA	N.D. Cent. Code §20.1-02-5(16) (Supp. 1981)
OHIO	Ohio Rev. Code Ann. §1531.25 (Page 1978)
WYOMING	Wy. Stat. §23-1-101, *et seq.* (1977)

The following states protect non-indigenous species but provide a general exception for species lawfully imported into the United States:

DISTRICT OF COLUMBIA	D.C. Code Ann. §22-1628 (1981)
IDAHO	Idaho Code §36-501 (Supp. 1982)
MINNESOTA	Minn. Stat. Ann. §97.488 (West 1977)
VERMONT	Vt. Stat. Ann. tit. 10, §§4046, 5401-5409 (Supp. 1982)

The following states protect non-indigenous species. Each statute contains a similar provision that specifically allows import of any species lawfully imported into the United States but allows sale only by permit from the state's wildlife authority. Petitioner treats these statutes as providing a general exception for species lawfully imported:

LOUISIANA	La. Rev. Stat. Ann. §56:1901, *et seq.* (West Supp. 1983)
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. chp. 212-A (Supp. 1981)
TENNESSEE	Tenn. Code Ann. §§70-8-105, 70-8-109 (1983)

The following states protect non-indigenous species but expressly provide an exception for species covered by a federal permit:

KANSAS	Kan. Stat. Ann. §32-501, *et seq.* (Supp. 1983)
MASSACHUSETTS	Mass. Ann. Laws Chp. 131, §4(13A), §26A (Michie/Law. Co-op. 1981)
VIRGINIA	Va. Code §29.230, *et seq.* (1950)
WISCONSIN	Wisc. Stat. Ann. §29.415 (West Supp. 1982)

The following states protect wildlife to some degree without an express limitation to resident species but do not explicitly adopt any of the lists of endangered or threatened species that have been or are maintained by the United States. Reference to the regulations promulgated under each of these statutes would be required to determine whether non-indigenous species are covered and whether exceptions are provided for species lawfully imported.

ALABAMA	Ala. Code Ann. §9-2-13 (1975)
ARKANSAS	Ark. Constitution, Amendment 35 (1947)
ALASKA	Alaska Stat. §§16.20.010-16.20-270 (1977)
ARIZONA	Ariz. Rev. Stat. Ann. tit. 17 (1956)

NORTH CAROLINA	N.C. Gen. Stat. §113-129(15), §113-291, *et seq.* (Supp. 1981)

The following states have laws similar to California in that non-indigenous species are covered, trade is prohibited, and no express exceptions are provided for species covered by federal permits or species lawfully imported into the United States:

CONNECTICUT	Conn. Gen. Stat. §26-40e (1981)
DELAWARE	Del. Code Ann. tit. 7, §601, *et seq.* (1974)
HAWAII	Hawaii Rev. Stat. §195D (1976)
ILLINOIS	Ill. Ann. Stat. chp. 8, §331, *et seq.* (Smith-Hurd 1975 & Supp. 1983)
INDIANA	Ind. Code Ann. §14-2-8.5 (Burns 1981)
IOWA	Iowa Code Ann. §§109A (West Supp. 1983)
KENTUCKY	Ky. Rev. Stat. Ann. §150.183 (Baldwin 1981)
MARYLAND	Md. Nat. Res. Code Ann. §10-2A-01 (1983)
MICHIGAN	Mich. Stat. Ann. §13.1204, *et seq.* (Callaghan 1981)
MISSISSIPPI	Miss. Code Ann. §49-5-101, *et seq.* (Supp. 1982)
MISSOURI	Mo. Ann. Stat. §252.240 (Vernon Supp. 1982)
MONTANA	Mont. Code Ann. §87-5-106 (1981)
NEBRASKA	Neb. Rev. Stat. §37-434, *et seq.* (1978)
NEW JERSEY	N.J. Stat. Ann. §23:2A-6 (West Supp. 1982)

NEW MEXICO	N.M. Stat. Ann. §17-2-41 (1978)
NEW YORK	N.Y. Envtl. Conserv. Law §11-0535 (McKinney Supp. 1983)
OKLAHOMA	Okla. Stat. Ann. tit. 29, §2-109, §7-503 (West 1976 & Supp. 1983)
OREGON	Ore. Rev. Stat. §498.026 (1981)
PENNSYLVANIA	Penn. Stat. Ann. tit. 34, §1351, *et seq.* (Purdon Supp. 1983)
RHODE ISLAND	R.I. Gen. Laws §20-37-1 (1982)
SOUTH CAROLINA	S.C. Code Ann. §50-15-20, *et seq.* (Law. Co-op, 1976)
SOUTH DAKOTA	S.D. Codified Laws §34A-8 (1977)
TEXAS	Tex. Parks & Wild. Code Ann. §68-0002, §68.015 (Vernon 1976 & Supp. 1981)
UTAH	Utah Code Ann. §23-13-4-5 (1953 & Supp. 1981)
WASHINGTON	Wash. Rev. Code Ann. §77.16.040 (Supp. 1983)
WEST VIRGINIA	W. Va. Code §20-2-1, *et seq.* (1981)

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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No. 82-2002

H. J. JUSTIN & SONS, INC.,
doing business as JUSTIN BOOT
COMPANY,

Petitioner,

v.

GEORGE DEUKMEJIAN, Governor
of the State of California,
et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT GOVERNOR OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF OF RESPONDENT GOVERNOR OF THE STATE OF CALIFORNIA IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On August 21, 1981, the United States District Court for the Eastern District of California issued its Memorandum and Order in the case of H. J. Justin &

Sons, Inc., dba Justin Boot Company v. Brown, Governor, State of California, No. CIV.S 80-941 RAR, granting respondent Governor of California's motion for summary judgment reported at 519 F.Supp. 1383 (E.D., Cal. 1981). (See Appendix, p. A1 to petitioner's Petition for Writ of Certiorari.)

On March 11, 1983, the United States Court of Appeals for the Ninth Circuit, Case No. 81-4492 reported at 702 F.2d 758, reversed in part and affirmed in part the opinion and judgment of the U.S. District Court for the Eastern District of California. (See Appendix, page A17 to petitioner's Petition for Writ of Certiorari.)

JURISDICTION

Petitioner asserts jurisdiction under 28 U.S.C. section 1254(1).

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QUESTIONS PRESENTED

1. Whether California Penal Code sections 653o and 653r are preempted by the Endangered Species Act of 1973. 16 U.S.C §§ 1531-1543.

2. Whether California Penal Code sections 653o and 653r are preempted by the Convention on International Trade in Endangered Species of Wild Fauna and Flora.[1]

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1. Before the trial court, petitioner invoked no treaty other than the Convention. On appeal, however, to the 9th Circuit and in the Petition for Writ of Certiorari, petitioner also invokes The General Agreement on Tariffs and Trade. (Petition for Writ of Certiorari, p. 2.)

"Errors not raised below will ordinarily not be considered on appeal. [Citations.]" Michael-Regan Co., Inc. v. Lindell (9th Cir. 1975) 527 F.2d 653, 659. The latter treaty is, nonetheless, fully addressed in this brief, should the Court wish to reach that new issue.

STATUTES INVOLVED

The statutes involved are California Penal Code sections 653o and 653r; the federal Endangered Species Act of 1973, 16 U.S.C. sections 1531-1543 specifically section 1535(f); the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.C. section 1087; TIAS 8249; and the General Agreement on Tariffs and Trade, 61 Stats. 73 (1947).

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The complaint in this case was filed on December 2, 1980. It sought a declaration of invalidity and an injunction against the enforcement of California Penal Code sections 653o and 653r. Section 653o provides in relevant part:

> "It is unlawful to import into this state for commercial purposes, to possess with intent to sell, or to sell within the state, the dead

> body, or any part or product thereof, of any . . . python . . . kangaroo . . . or elephant."

Section 563r states that the violation of section 653o constitutes a misdemeanor.

Petitioner alleged that it wishes to sell, in California, boots made from the hides of the above species, but that both it and its customers are deterred by the above statutes. It alleged that the California statutes are unconstitutional, in that they have been preempted by the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 27 U.S.T. 1087, T.I.A.S. 8249, and by the Endangered Species Act of 1973, 16 U.S.C. sections 1531-1543. Petitioner additionally alleged that the state statutes violate the Commerce Clause.

The parties filed cross-motions for summary judgment. On August 21, 1981, the District Court issued a Memorandum and Order

denying petitioner's motion for summary judgment, and granting respondents' motion.[2/] Judgment was entered on August 24, 1981. On September 22, 1981, petitioner filed a notice of appeal (CR 11). On March 11, 1983 the United States Court of Appeals for the Ninth Circuit reversed in part and affirmed in part the opinion and judgment of the U.S. District Court. (See Petition Appendix, p. A17; reported at 702 F.2d 758.)

ARGUMENT

I

CALIFORNIA PENAL CODE SECTIONS 653o and 653r ARE NOT PREEMPTED BY THE ENDANGERED SPECIES ACT OF 1973.

A. Introduction.

Petitioner argues that California Penal Code sections 653o and 653r are expressly preempted by the Endangered

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2. The District Court's Memorandum and Order is published at 519 F.Supp. 1383.

Species Act of 1973 (16 U.S.C. §§ 1531-1543). (Petitioner's Petition for Writ of Certiorari, hereafter "Petition", pp. 7, 10.)

Both sides in this case rely upon conflicting interpretations of 16 U.S.C. § 1535(f), which provides as follows:

> "(f) Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this chapter or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this chapter or in any regulation which implements this chapter. This chapter shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter or in any regulation which implements this chapter but not less restrictive than the prohibitions so defined."

B. The Provisions of Section 1535(f).

"Logic and precedent dictate that '"[t]he starting point in every case involving construction of a statute is the language itself."' [Citations.]" Greyhound Corp. v. Mt. Hood Stages, Inc. (1978) 437 U.S. 322, 330, 98 S.Ct. 2370, 57 L.Ed.2d 239. Accordingly, we will first review with some care the language of section 1535(f).

The statute sets forth two instances in which a state law is void:

First, a state law may not:

"(1) permit what is prohibited by this chapter. . . ."

Thus, federal law provides the minimum national standards of protection, and a state may not in any case be more lenient than federal law.

If a state may not be more lenient than the minimum national standards, may it

be more strict? The second proviso answers this question. A state law may not:

> "(2) prohibit what is authorized pursuant to an exemption or permit. . . ."

The sentence goes on to state how an exemption or permit may be enacted, i.e., by being "provided for in this chapter or in any regulation which implements this chapter."

There is an exception to the proviso that a state law may not "prohibit what is authorized pursuant to an exemption or permit." It pertains to taking of resident species.

With respect to resident species:

> "Any state law or regulation respecting the taking of an endangered gered species or threatened species may be more restrictive than the exemptions or permits provided for in this chapter. . . ." (Emphasis added.)

The meaning of the language in section 1535(f) is straightforward and if read with care is not subject to serious doubt or

need for arcane interpretation: States may never be more permissive than the minimum national standards; nor may they contravene the terms of an exemption or permit; except that with respect to resident species a state may be more restrictive than an exemption or permit.

C. The Legislative History of Section 1535(f) Conclusively Demonstrates Congress' Intention to Prevent the ESA From Preempting State Laws Prohibiting Importation of Species Not Covered by ESA.

The District Court considered the legislative history of section 1535(f) at length (519 F.Supp. at 1388-1389) and concluded that explicit portions of that history bearing on this matter "are unequivocal and are not qualified by any other portion of the legislative history." Id. at 1389.

The legislative history, is unusually explicit, and utterly contradicts petitioner's interpretation of the statute.

Indeed, the precise origin of the statutory language is revealed as being a letter from the Department of the Interior, which also contained an explanation that the language was intended to prevent preemption, and was written in response to the desire of Congress to prevent preemption of state laws, including the very statute at bar.

With this background, we will trace the history of the Act as it pertains to preemption.

It should be noted, first, that predating the Endangered Species Act of 1973 is another statute, 16 U.S.C. section 667e, which remains valid and in force:

> "All dead bodies, or parts thereof, of any foreign game animals, or game or song birds the importation of which is prohibited, or the dead bodies or parts thereof, of any wild game animals or game or song birds transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or

> Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such animals or birds had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

Congress, therefore, has manifested no hostility to State regulation of foreign animal parts being brought into the State for sale or use therein. Petitioners Petition contains no discussion of this statute.

Also predating the Endangered Species Act of 1973 is the Endangered Species Act of 1969 (Pub. L. 91-135; 83 Stats. 275, § 7). Arguments of preemption based on this Act were directed against New York's Mason Act (an act quite similar to the California statutes at bar) in Palladio v. Diamond (2d Cir. 1971) 440 F.2d 1319, cert. den. 404 U.S. 983, adopting and affirming 321 F.Supp. 630; and A.E. Nettleton v. Diamond (1970) 27 N.Y.2d

182, 315 N.Y.S.2d 625, 264 N.E.2d 110, appeal dismissed sub nom Reptile Products Assn. v. Diamond, 401 U.S. 969, 91 S.Ct. 1201, 28 L.Ed. 2d 319.

In Palladio, the plaintiff contended that the absence of a species of crocodiles on the Endangered Species List precluded New York from forbidding the sale of products made from this species. The Court, addressing the issue of implied preemption (the 1969 Act had no counterpart to section 6 of the 1973 Act (16 U.S.C. § 1535(f)), quoted supra), found no incompatibility between the two laws and further stated at p. 635:

> "We likewise find no merit in plaintiff's contention that the Mason Law interferes with Congress' power to regulate commerce and to make treaties, with federal control over foreign affairs, and with the supremacy clause of the Constitution. On the contrary the Endangered Species Act invites state action."

The Nettleton case, which involved the same issues, was decided by the New York Court of Appeals. At page 630, the court described the applicable preemption rule derived from Florida Lime and Avocado Growers v. Paul, (1963) 373 U.S. 132 at p. 141 as follows:

> "[P]reemption could only occur if there was 'such actual conflict between the two schemes of regulation that both cannot stand in the same area (or) evidence of a congressional design to preempt the field' (citation omitted). Turning to the first test (State power to legislate), there is no real conflict between the Federal statute and the Mason Law. While it is true that our State statute includes species which are not on the Federal list . . ., there has been no showing that compliance with both the Federal and State law is an impossibility (see Bibb v. Navajo Frgt. Lines, 359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003; Morgan v. Virginia, 328 U.S. 373, 66 S.Ct. 1050, 90 L.Ed. 1317; 27 S.Ct. 367, 51 L.Ed. 523). Nor has it been demonstrated that the Mason Law could not be enforced without impairing the effectiveness of the Federal Act. The Industry has not shown that wildlife conservation is

> a matter exclusively within the sphere of Federal competence . . . Thus, it would seem that the pre-emption question narrows down to whether Congress by the 1969 Act has evidenced its design to exclude State action. We think it has not. Federal displacement of the 'historic police powers of the States' should not be decreed 'unless that was the clear and manifest purpose of Congress' (Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 91 L.Ed. 1447). 'In other words, we are not to conclude that Congress legislated the ouster [of the Mason Law by the Federal Act] in the absence of an unambiguous congressional mandate to that effect' [citation omitted]. We find no such mandate."

This case background was of importance when the Endangered Species Act of 1973 was before Congress. Four bills were considered:

H.R. 37 and S. 1983 were Congressionally initiated measures, while H.R. 4758 and S. 1592 were sponsored by the Department of Interior. Section 4(e) of the later bills, which addressed the issue of preemption of state laws, was generally less

amenable to more restrictive state legislation than was the analogous section 6(f) of the former measures. Congress ultimately enacted the substance of H.R. 37 as the Endangered Species Act of 1973.

House of Representatives Report 93-412, 93d Congress, 1st Session (July 27, 1973) discussed the language which was to become 16 U.S.C. section 1535(f). At page 7 of the Report, it is stated:

> "The question of preemption of state laws was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exportation or interstate commerce; in any such case the State could not override the Federal action. In every other

respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired." (Emphasis supplied.)

Summarizing section 6(f) of the Act, the Report said at page 14:

"(f) This paragraph indicates that the states are to be free to develop regulatory mechanisms which are more stringent or more restrictive than those of the Federal government. Existing state endangered species programs would, for example, be in a position to include species which were not on the Federal list. The only exception to this is contained in the language which expressly prohibits the state from permitting specific actions forbidden by Federal agencies. In all other regards, the state law is not preempted, but is merely subject to the Federal "floor" of regulations under the Act. Thus, laws already passed in States such as New York, California and Hawaii, which list additional species or prohibit such activities as sales within their jurisdiction would remain unaffected." (Emphasis supplied.)

The question of State preemption was indeed of great interest during the hearings. In Hearings Before the House Com.

on Merchant Marine and Fisheries On H.R. 37, 93d Cong., 1st Sess. at pp. 351 et seq., an extensive presentation was made by an Assistant Attorney General of the State of New York in opposition to H.R. 4758 on the ground that the former bill would reverse the result of the cases, cited above, sustaining New York's Mason Law under the 1969 Act. Id. at pp. 351-362. A Statement from the Attorney General of New York, Louis Lefkowitz, to the same effect, was presented. Id. at p. 362.

Likewise, the Attorney General of California presented a statement on behalf of California Penal Code section 653o, the very statute at bar. It was noted that 653o "is similar to New York State's Mason Law in that California protects certain species that the Secretary of the Interior has not yet found to be endangered and therefore are not

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protected by federal law." Id. at pp. 374-375.

The letter continued:

> "One example is illustrative of the value of allowing states such as New York and California to contribute to the effort to protect species which are being subjected to commercial exploitation and are threatened with extinction. In 1971 the California legislature gave protection to several additional species threatened with extinction including the kangaroo. At that time, vast numbers of kangaroo were being killed for pet food and hides. Effective April 1, 1973, the Australian government completely banned the export of kangaroo hides and meat. The Secretary of the Interior is presently considering the proposed addition of several species of kangaroo to the federal endangered species list. Hopefully, this action has not come too late.
>
> "We join with the Attorney General of New York in strongly recommending that your subcommittee amend H.R. 4758 to allow states to have more restrictive laws to protect endangered species. We are also of the opinion that your own bill, H.R. 37, presents the best approach in this regard."

Representative Dingell sent a copy of these materials to Mr. Reed, Assistant

Secretary of the Interior, noting that "the Interior Department's position is that the language of H.R. 4758 does not in any significant respect bar the application of the Mason Act." Id. at p. 386.

Mr. Reed wrote back and, still referring to the more restrictive language of H.R. 4758, said:

> "It was not our intention in drafting section 4(e) of H.R. 4758 to: (a) void State laws, such as New York's Mason Act, which apply to the sale of species not appearing on the federal endangered species lists; (b) void such State laws, even if they effectively prohibit sales of species which would appear on the Federal list, whether or not the transactions occur or the articles move in interstate or foreign commerce; (c) to void State laws forbidding importation or exportation of any fish or wildlife for bona fide State purposes, such as the protection of human health or wildlife ecology; (d) void all State laws which regulate interstate or foreign commerce in endangered or non-endangered species by 'preempting the field' of commercial restraints upon the trade in or movement of such fish and wildlife in interstate or

foreign commerce." (Id. at p. 387, emphasis in original.)

The only limitation was:

> ". . . that the State should not be permitted to prohibit acts which are expressly allowed by a Federal permit or exemption, or to permit what is prohibited by Federal law." (Id., emphasis in original.)

Continuing the distinction between express permission, and mere lack of restriction, Mr. Reed said:

> "Whereas Congressional silence as to certain species or in certain regulatory areas need not, in our view, be construed as a Fedeal permission to sell or trade in species not listed pursuant to the bill (Robertson v. People of the State of California, 328 U.S. 440 [1946]), subsection 4(e) of the bill does raise this implication.
>
> "We, therefore, offer for your consideration the following substitute language to more clearly identify our intent with respect to both State 'taking' laws, as well as State laws which regulate commerce: . . ."

Mr. Reed thereafter offered new language virtually identical to section 1535(f).

He concluded by noting that under this language the States could, "subject to very narrow limitations, . . . regulate not only federally listed species, in company with the Federal Government, but to regulate species not so listed, completely free from the reach of this Act." (Id. at p. 388, emphasis supplied.)

As was quoted above from the Commission Report, the Administration bill was rewritten to reflect Mr. Reed's suggested wording and to permit state statutes such as the Mason Act and California Penal Code section 653o to remain unpreempted.

A clearer statement of Congressional intent could not be found. Moreover, the Committee's interpretation of the proposed Act was followed unanimously by both houses of Congress. As Representative Grover, one of the principal proponents of the measure, stated:

> "[W]e have adequately protected legitimate state interests, powers, and authorities in H.R. 37 by providing for concurrent Federal/state jurisdiction and permitting the States to enact their own more restrictive laws; if so desired. Such fine acts as New York's Mason Act. . . will not be superseded by this bill to the extent that such State laws are more restrictive. . . ." (119 Cong. Rec. 30165.)

The Senate echoed the conclusions of the House. Senator Tunney of California, a sponsor of S. 1983, and Senator Stephens, a major supporter of the bill, made clear that the preemptive provisions of the federal Act was aimed not at more restrictive state legislation, but at excessively permissive state laws which failed to provide adequate protection to regulated species of wildlife. Id. at pp. 25670-25673. Indeed, Senator Stephens specifically approved the existing endangered species legislation of the States of Alaska, Illinois and Texas, all of which were similar to Penal Code sections 653o and 653r, as

models of effective state legislation in the field.

In summary, California Penal Code sections 653o and 653r, and the similar endangered species legislation of other states, received the utmost deference and approval from the Congress that enacted the Endangered Species Act of 1973.

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II

THE CALIFORNIA STATUTES ARE NOT PREEMPTED BY ANY TREATY.

A. Introduction.

Petitioner devotes a significant portion of its Petition to explicating treaties which it claims are inconsistent with state regulation of trade in the species at bar. (Petition, 5, 7, 8, 15-17.)

In this portion of respondents' brief, we will first demonstrate that petitioner is sorely misreading the treaties it invokes. Second, we will present ample authority for the proposition that even if the treaties did, in fact, conflict with the Act, it is the treaties, rather than the Act, which would yield.

We note, at the outset, that the amicus brief of the United States filed in the 9th Circuit Court proceedings supports the position of respondents that the state

statutes are not preempted by treaty. (Brief of the United States as Amicus Curiae, pp. 9-10; see Appendix hereto.) The District Court also so concluded. (519 F. Supp. at 1390.)

B. The Convention on International Trade in Endangered Species of Wild Fauna and Flora Does Not Preempt The State Statutes.

1. The Convention Is Not Self-Executing, But Was Rather Implemented By the Endangered Species Act, Which In Turn Expressly Sanctions the State Statutes.

The District Court properly found it unnecessary to address the terms of the Convention. (519 F.Supp. at 1390.) As the Court concluded:

> "The Convention is not self-executing since implementing legislation must be enacted by Congres before the Convention has the force of law. Moreover, once enacted, it is the implementing legislation, and not the treaty itself, that is

the law of the land, Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980):

> "Moreover, 'if a treaty is not self-executing it is not the treaty bu the implementing legislation that is effectively "law of the land."'
>
> "The implementing legislation of the Convention is the Endangered Species Act of 1973, see, e.g., 16 U.S.C. §§ 1531(4)(F), 1532(4), 1537a, and 1538(c). In light of the Court's conclusion that the Endangered Species Act of 1973 did not preempt California Penal Code §§ 653o and 653r, there is no need to discuss the terms of the Convention." (Id.)

The United States agrees with this reasoning as well. (Brief of the United States as Amicus Curiae, p. 9, see appendix.)

While petitioner likewise notes that the Convention and the Endangered Species Act were contemporaneously adopted, no attention whatever is paid in petitioner's petition to the trial court's (adopted by the 9th Circuit court) reasoning on this issue.

As petitioner has provided nothing to refute, we will simply ask the Court to affirm the circuit court's resolution on this issue on the ground articulated in its Memorandum by denying the petition for a writ of certiorari.

2. The Terms of the Convention Refute Petitioner's Contention.

Far from forbidding the signatories from imposing conditions on trade which are more protective than is provided by the Convention, Article XIV of the Convention expressly provides as follows:

> "The provisions of the present Convention shall in no way affect the right of the parties to adopt:
>
> "(a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
>
> "(b) domestic measures restricting or prohibiting trade, taking possession, or transport of

species not included in Appendices I, II, or III. . . ."

Petitioner cannot explain how a "preemption" argument can be based on the Convention in light of this anti-preemption provision. The Convention is quite clearly addressed to restricting trade in certain animals, and expressly declines to discourage stricter domestic regulation or prohibition of trade in animals whether or not such trade is regulated under the Convention. Petitioner's attempt to transmute the Convention into a treaty designed to promote trade in animals against interfering domestic regulation is an attempt to stand the Convention on its head.

Nor can it be argued that California is not a party to the Convention, and that under the Convention only a "party" may adopt stricter domestic measures.

The short answer to this is that the United States is a party to the

Convention, and that its "stricter domestic measure" is 16 U.S.C. § 1535(f).

The idea that the Convention forbade a signatory which is organized in a federal system from providing for comity with its states is not to be found in the language or purport of that treaty. Article XIV nowhere presumed to interfere with the governmental organization of the United States by requiring that the "stricter domestic measures" be measures that preempt state statutes and operate identically throughout the territory of the signatory.

As was said in United States v. Pink (1942) 315 U.S. 203, 230:

> "[T]reaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy. Guaranty Trust Co. v. United States, supra [304 U.S. p. 143, 82 L.Ed. 1234, 58 S.Ct. 785] and cases cited. For example in Todok v. Union State

> Bank, 281 U.S. 449 [4 L.Ed. 956, 50 S.Ct. 363] this Court took pains in its construction of a treaty, relating to the power of an alien to dispose of property in this county, not to invalidate the provisions of state law governing such dispositions. Frequently the obligation of a treaty will be dependent on state law. Prevost v. Greneaux, 19 How U.S. 1 [15 L.Ed. 572]."

The United States makes appropriately short shrift of this point by quoting Article XIV and noting that section 1535(f) "of course, implements CITES in the United States". (Brief of the United States as Amicus Curiae, p. 9.) Little more need be said.

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C. The General Agreement on Tariffs and Trade Does Not Preempt the State Statutes.

Petitioner's invocation of the 1947 treaty entitled the General Agreement of Tariffs and Trade is most peculiar.[3/]

As petitioner explains the treaty:

> "The General Agreement on Tariffs and Trade ("GATT") accords most favored nation status to such countries as Australia, New Zealand, Burma and Ceylon. As amended, it represents an international policy of non-discriminatory trade among the highly developed signatory nations (Parts I-III) as well as a policy of free trade on a basis favorable to the less developed nations (Part IV). The GATT expressly recognizes the right of a signatory nation to prohibit trade in a particular article of commerce 'to protect human, animal, or plant life or health,' Article XX, GATT, Part II, but requires the contracting parties to assure compliance by their political subdivisions at the local level. Article XXIV(12),

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3. As was noted above (at note 1), this treaty was injected into the case for the first time in Appellant's Opening Brief. The District Court therefore did not have the opportunity to rule on this issue.

GATT, Part III. Leather is a category of like articles of commerce for purposes of the GATT and the Tariff Act of 1930, 19 U.S.C. §1202, Part 5." (Petition, pp. 15, 16.)

Is petitioner contending that 16 U.S.C. section 1535(f) is not designed to protect animal life, as allowed under the General Agreement? One cannot tell.

Petitioner's obscure contention that section 1535(f) somehow interferes with some nation's "most favored nation" status regulating tariffs is not easily to be understood at all.

Suffice it to say, as shall be shown in the next section of this brief, if 16 U.S.C. section 1535(f) provides for the vitality of the California statutes, the Court need not puzzle through petitioner's claim respecting the General Agreement.

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D. As Section 1535(f) Expressly Sanctions the State Statutes, Petitioner's Attempt To Construe Treaties As Contradicting the Statutes Is Pointless.

Petitioner apparently believes that a treaty conflicting with 16 U.S.C. section 1535(f) would invalidate that statute and in turn invalidate the California statutes promulgated thereunder. (AOB 9-10, 18-19, 23-24.) Petitioner is in error.

While under the Supremacy Clause of the United States Constitution treaties have supremacy over state laws in conflict therewith, they have only parity with congressional enactments. It is well established that subsequent congressional acts govern over an earlier treaty. (Whitney v. Robertson (1888) 124 U.S. 190; the Head Money Cases (1884) 112 U.S. 580; U.S. v. Rumsa (1954) 212 F.2d 927, cert. den. 340 U.S. 838; U.S. v. 85,237 Acres of Land,

More or Less, in Zapata County, Texas (1957) 157 F.Supp. 150, aff'd Guerrero-Zapata Bridge Co. v. U.S., 252 F.2d 116; Calnetics Corp. v. Volkswagen of America, Inc. (D.C. Cal. 1973) 348 F.Supp. 623; U.S. v. Consolidated Wounded Knee Cases (D.C. Neb. 1975) 389 F.Supp. 235; U.S. v. McIntire (D.C. N.J. 1973) 365 F.Supp. 618; Tag v. Rogers (C.A.D.C. 1959) 267 F.2d 664, cert. den. 362 U.S. 901; Ex Parte Green (C.C.A.2d 1942) 123 F.2d 862, cert. den. 316 U.S. 668; John E. Bill Co. v. U.S. (Cust. & Pat. App. 1939) 104 F.2d 67; Watson v. Hoey (D.C. N.Y. 1945) 59 F.Supp. 197; Savelis v. Vlachos (D.C. Va. 1956) 137 F.Supp. 389, aff'd 248 F.2d 729.) Since, under these authorities, Congress may by subsequent legislation modify an earlier treaty, assuming arguendo that the Endangered Species Act of 1973 is inconsistent with the Convention, or the General Agreement, the Act would control.

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Additionally, we doubt that petitioner is a proper party to raise the issue of a fanciful "conflict" between the Convention and the Act. It would appear a more appropriate issue to be raised between the signatories to the Convention. (Skiriotes v. State of Florida (1941) 313 U.S. 599; Hjelle v. Brooks (D.C. Alaska 1974) 337 F.Supp. 430.)

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III

THE CALIFORNIA STATUTES ARE NOT PREEMPTED BY ANY PERMIT.

A. Introduction.

At this point, we have established that neither the Convention, nor the General Agreement, nor the Act automatically preempt the California statutes. Petitioner does not contend that the federal government has adopted an exemption for these species.

The case comes down to whether the California statutes

> "prohibit what is authorized pursuant to . . . [a] permit provided for in this chapter or in any regulation which implements this chapter." (16 U.S.C. § 1535(f).)

The proper analysis of this issue requires that the regulatory status of the species at bar be examined separately.

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1. Indonesian Pythons.

As petitioner explains:

> "The Indonesian python is also listed as a threatened species under Appendix II of the Convention but is not enumerated as an endangered or threatened species under §1533 of the Act. (Petition, p. 5.)

Accordingly, an export permit issued by the country of origin is required, but no permit issued by the Secretary of Interior under the Endangered Species Act is provided for.

Petitioner thus is not operating under any permit issued by the federal government with respect to pythons, and does not invoke the permit exemption set forth in section 1535(f). As the United States indicated in its amicus brief:

> "Because the federal government has taken no specific action under the ESA to regulate the importation or sale of [this] species, the California law relating to the sale of parts of [this] species is not preempted." (Brief of the United States as Amicus Curiae, pp. 6-7.) (See Appendix.)

The states' power to regulate species not regulated by the federal government was not left in a state of ambiguity either in the language of the state or in the legislative history:

> "Existing state endangered species programs would, for example be in a position to include species which were not on the Federal list . . . Thus laws already passed in States such as . . . California . . . which list additional species or prohibit such activities as sales within their jurisdiction, would remain unaffected." (H.R. Rep. No. 93-412, 93rd Cong., 1st Sess., p. 14 (1973); see id. at p. 7.)

2. Robustus Kangaroo.

As petitioner explains:

> "The Australian kangaroo (Macropus robustus) is not enumerated in any appendix to the Convention and is not listed as either endangered or threatened under the Act. Therefore, no permit is required in order to import the skins of the Austrialian kangaroo lawfully into the United States." (Petition, p. 5.)

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Accordingly, as petitioner indicated to the District Court, it "has no permit or exemption from the Secretary of Interior to import or sell in interstate commerce the . . . Wallaby kangaroo." (519 F. Supp. at 1390.)

The identical analysis applicable to the Indonesian python thus applies to the kangaroos at bar.

CONCLUSION

It is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Attorney General

R. H. CONNETT
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Attorneys for Respondents

APPENDIX

No. 81-4492

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

H.J. JUSTIN & SONS, INC., ETC.,

Plaintiff-Appellant

v.

EDMUND G. BROWN, JR., ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

CAROL E. DINKINS
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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 81-4492

H.J. JUSTIN & SONS, INC., ETC.,

Plaintiff-Appellant

v.

EDMUND G. BROWN, JR., ET AL.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the respective areas of operation of state and federal statutes designed to protect endangered species, and the effect to be given a federal permit which authorizes, pursuant to a federal statute, an activity prohibited by state law. The United

States believes that its views on these questions may be of assistance to the Court in its consideration of this case.

OPINION BELOW

The opinion of the district court (Honorable Raul A. Ramirez) was issued on August 21, 1981.

QUESTION PRESENTED

Whether a California statute prohibiting the sale of elephant parts is applicable to a company which has been issued, pursuant to the federal Endangered Species Act of 1973, 16 U.S.C. 1531 et seq., a permit authorizing it to sell African elephant parts or products in interstate commerce.

STATEMENT

H.J. Justin & Sons, Inc., a Texas boot manufacturer, wishes to sell boots made from the hides of the Indonesian python, the Wallaby Kangaroo (Macropus robustus)

and the African elephant in the State of California. Sections 653o and 653r of the California Penal Code prohibit the importation into California for commercial reasons, the possession with intent to sell, or the sale within the State, of the parts or products of 24 different animals, including the "python, * * * kangaroo, * * * or elephant." The statutes make no distinction between different species of the listed animals, but apply to all types of pythons, kangaroos and elephants.[1/] Justin has a permit from the federal government authorizing it to import into this country and sell African elephant parts. It brought this action against the Governor of the State of California and other state officials to secure a declaratory judgment that the pertinent sections of the California Penal

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1/ Biologists recognize over 50 different species of "kangaroo," many species of "python" and at least two species of elephants.

Code are inconsistent with certain federal statutes and thus are, to that extent, invalid. Justin also sought to enjoin the defendants from enforcing those statutes.

On cross-motions for summary judgment, the district court held that the California statutes were not preempted by international treaty (the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 27 U.S.T. 1087, T.I.A.S. 8349), or by federal law (the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 et seq.). It also rejected Justin's claim that the California statutes constituted an impermissible burden on interstate commerce, and concluded that Justin was prohibited in California from selling python, kangraoo and African elephant parts or products. The district court ruled that the federal permit issued by the Secretary of the Interior authorized Justin to sell African elephant parts

or products only if not prohibited by state law. Justin has appealed.

ARGUMENT

SPECIFIC FEDERAL AUTHORIZATION PURSUANT TO THE ENDANGERED SPECIES ACT TO IMPORT OR SELL IN INTERSTATE COMMERCE THE PARTS OF A SPECIFIC ANIMAL OVERRIDES INCONSISTENT STATE LAW

While we agree with the district court's conclusion that California statutes designed to regulate fish and wildlife are not automatically preempted by the ESA or CITES. Authorization given pursuant to ESA to import into and sell in this country parts or products of African elephants, however, necessarily overrides any provisions of California law which may purport to prohibit such importation or sale.

Congress enacted the Endangered Species Act of 1973 in part to carry out its obligations under CITES and other international agreements designed to protect fauna and flora facing extinction. The ESA created two categories of species to which it extended

protection: endangered species, which includes any species in danger of extinction throughout all or a significant portion of its range, and threatened species, which includes any species likely to become an endangered species in the foreseeable future. 16 U.S.C. 1532(6) and (20).

Unless specifically authorized or exempted, the ESA prohibits the sale, import, or export of endangered species. 16 U.S.C. 1538(a). With respect to threatened species, the Secretary of the Interior may issue regulations necessary to provide for the conservation of those species, including the prohibition of any act which is prohibited for the protection of endangered species. 16 U.S.C. 1533(d). The Secretary has by regulation made all the restrictions applicable to endangered species also applicable to threatened species in the absence of contrary provisions. 50 C.F.R. 17.31 (1980). The ESA, however, also authorizes the Secretary

to issue permits allowing acts otherwise prohibited by ESA when necessary for scientific purposes or to enhance the propagation or survival of an affected species. 16 U.S.C. 1539(a).

The well understood rule with respect to the resolution of conflicts between state and federal statutes is that while the initial assumption is that "the historic powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," yet when Congress has "unmistakenly * * * ordained" that its enactments are to regulate some part of commerce, inconsistent state laws regulating that aspect of commerce must fall. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). And where, as here, the congressional enactments do not exclude all state legislation in the same field, they "nevertheless override state laws with which they conflict." Ibid., 525-526.

It is clear that in the instant case, Congress has "unmistakenly ordained" that state laws pertaining to the commerce in endangered or threatened species are to be void to the extent that they purport to prohibit what the federal government expressly by permit authorizes to be done. Section 6(f) of the ESA, 16 U.S.C. 1535(5), provides that:

> Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. [Emphasis supplied.]

Section 6(f) of the ESA is derived without change from Section 6(f) of H.R. 37 (93d Congress, 1st Session). The Report of the House Committee on Merchant Marine and Fisheries (House Report 93-412, pages 7-8; July 27, 1973) says with respect to this Section that:

> The question of preemption of state laws [regarding the taking of listed species] was of great interest during the hearings, due in part to the fact that the language in the Administration bill was susceptible of alternative interpretations. Accordingly, the Committee rewrote the language of the Administration bill to make it clear that the states would and should be free to adopt legislation or regulations that might be more restrictive than that of the Federal government and to enforce the legislation. The only exception to this would be in cases where there was a specific Federal permission for or a ban on importation, exploitation or interstate commerce; in any such case the State could not override the Federal action. In every other respect, the State powers to regulate in a more restrictive fashion or to include additional species remain unimpaired. [Emphasis supplied.]

Manifest from this is the congressional intent that federal actions either to ban or to permit interstate a foreign commerce in animal parts supersedes or *precludes inconsistent* state action.

Although the Secretary has listed the Indian python as an endangered species (50 C.F.R. 17.11 (1980)), five types of rat-kangaroo as endangered species (id.), six types of wallabys as endangered species (id.), and three other types of kangaroos (the red, the eastern gray, and the western gray) as threatened species (50 C.F.R. 17.11 and 17.40(a) (1980)), as amended by 46 Fed. Reg. 23929 (April 29, 1981), the Secretary has not listed either the Indonesian python or the Macropus robustus (Wallaby Kangaroo) as endangered or threatened species. Because the federal government has taken no specific action under ESA to regulate the importation or sale of these two species, the California law relating to the sale of parts of these species is not preempted.2/

2/ Justin argued that Section 6(f) only allowed the states to regulate indigenous species. The district court disagreed, reasoning that the first sentence of Section

(Footnote 2/ continued next page.)

The African elephant, however, is listed as a threatened species, 50 C.F.R. 17.11(h) (1980), and the Secretary has adopted special regulations which govern the importation of that animal and establish certain conditions for obtaining a permit from the Secretary to engage in trade in that species. 50 C.F.R. 17.40(e) (1980). Justin has obtained such a permit authorizing it to sell parts or products of African Elephants in interstate commerce. Therefore, as applied to Justin, the California

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2/ continued

6(f) governs preemption of state laws applying to non-indigenous species while the last two sentences of that Section govern preemption of state laws applying to indigenous species. We agree with this analysis for the reasons stated in the district court's opinion (slip op. at 4-7). Therefore, under the first sentence of Section 6(f), states can regulate non-indigenous as well as indigenous species to the extent that the regulation does not permit what is prohibited by the ESA or does not prohibit what is authorized pursuant to an exemption or permit under ESA.

statutes prohibiting the sale of elephants in California are preempted by that portion of Section 6(f) of ESA which voids state law to the extent that it prohibits what has been authorized by an ESA permit.

In concluding otherwise, the district court relied upon a condition in Justin's permit which provides that the validity of the permit was "conditioned upon strict observance of all applicable foreign, state, local of other federal law," and held that the permit's requirement that Justin comply with California law precluded it from selling parts or products of the African elephant.

The United States disagrees with the district court's interpretation of the language in the federal permit. In the government's view, the permit requires compliance with "applicable" state laws, i.e., those regulating the method by which

permitted activities are carried out (e.g., quarantine laws), but was not intended to defer to inconsistent state laws barring the very activity the permit authorizes. This interpretation conforms to the policy in Section 6(f) of the ESA of preemption of inconsistent state laws through federal authorization by permit or regulation (see page 7, supra), and is therefore reasonable. As the interpretation of the author of the permit, moreover, it is entitled to deference. See Udall v. Tallman, 380 U.S. 1, 16 (1965).

The preemptive effect of CITES presents a separate question. The United States is an original party to CITES, which it signed in 1973 and which entered into force in July 1975. The Convention regulates international trade in endangered species of wild fauna and flora and is implemented by the ESA. 16 U.S.C. 1537(a). Species

protected under the Convention are listed in one of three appendices: Appendix 1 includes all species threatened with extinction which are or may be affected by trade; Appendix II includes species which are not now necessarily threatened with extinction but may become so unless their trade is subject to strict regulation; and Appendix III includes all species which any party to the Convention currently regulates to prevent exploitation and which requires the cooperation of the other parties to control trade. CITES, Art. II. The trade of species listed within these appendices requires an export permit from the country of origin and, for Appendix I species, an import permit from the country of importation. CITES, Art. III-V. The African elephant and all pythons, including the Indonesian python, are listed in Appendix II of CITES and, therefore, require

an export permit from the country of origin. The Macropus robustus is not protected under CITES.

In addition to concluding that the ESA does not preempt Sections 653o and 653r of the California Penal Code, the district court also concluded that CITES does not preempt those statutes. This conclusion, in our opinion, is correct, not only for the reasons stated by the district court (slip op. at 12-13), but also because of Article XIV of CITES, which specifies that it does not affect the right of the "parties" to the Convention to adopt:

> (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
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> (b) domestic measures restricting or prohibiting trade, taking, possession, or transport of species not included in Appendices I, II or III.

CITES, therefore, specifically allows stricter regulation by its member parties. Section 6(f) of the ESA, of course, implements CITES in the United States and permits more restrictive state regulation subject to the right of the United States by regulation, or (as here) by permit, to take some authorized action which may be inconsistent with -- and would thus pro tanto override -- the state law.

CONCLUSION

For the foregoing reasons, we urge that this Court affirm the holding of the district court that neither ESA nor CITES preempts California's statutes prohibiting the sale of the parts or products of the Indonesian python and the Macropus robustus, but that this Court reverse the district court's holding that the appellant herein may not, pursuant to its federally

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issued permit, sell African elephant parts or products within the State of California.

Respectfully submitted,

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